OGC 75-1019

18 March 1975

MEMORANDUM FOR: FOI Management and Review Personnel

SUBJECT : Specificity Required in Denial of Documents Requested Under FOI

1. This memorandum is a follow-up to our memorandum of 10 March (OGC 75-0857) concerning the nature and extent of the process by which we must review documents and make and record our FOI decisions concerning them.

2. Attached is a copy of a 1973 decision of the U.S. Court of Appeals for the District (Vaughn v. Rosen) which indicates that it is not sufficient for the government to merely assert that documents, unidentified and unexplained, fall within some or any specific one of the nine FOI exemptions. Rather, the government's decisions must be in terms which give the requester sufficient information to enable him to understand the government's position and conclusion. Therefore the government, without compromising the secret information involved, must describe the documents and explain the basis for the application of the exemption claimed, at least in general terms; and this must be done with respect to portions of the documents, as appropriate.

3. I think these requirements must be in mind as we review documents, record our denial decisions and draft our denial letters, at both the initial action and appeal stages.

[redacted]

Associate General Counsel

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Attachment

Robert G. VAUGHN, Appellant,

v.

Bernard ROSEN, Executive Director, United States Civil Service Commission, et al.

No. 73-1039.

United States Court of Appeals, District of Columbia Circuit.

Argued June 7, 1973.

Decided Aug. 20, 1973.

Rehearing Denied Oct. 18, 1973.

A law professor doing research on the Civil Service Commission brought an action pursuant to the terms of the Freedom of Information Act to compel disclosure by the Commission of certain reports of the Bureau of Personnel Management. The Commission, by a conclusory affidavit, claimed that the documents in question were of such nature as to fall within exceptions to the Act's general requirements of disclosure. The District Court for the District of Columbia, John H. Pratt, J., entered summary judgment for the Commission on that ground. On the professor's appeal, the Court of Appeals, Wilkey, Circuit Judge, held that the record before it was insufficient to permit a determination of whether the documents were subject to disclosure under the Act, and remanded the case with directions that the Commission provide detailed justification of its claims, that it specifically itemize and index the documents or portions thereof so as to show which were disclosable and which were exempt and that, in its discretion, the trial court might designate a special master to examine the documents and evalute the Commission's contentions of exemption.

Remanded with directions.

1. Records ⇐14

Statutory exemptions from disclosure of government documents under Freedom of Information Act must be construed narrowly in such way as to provide maximum access consonant with overall purpose of Act. 5 U.S.C.A. § 552.

2. Records ⇐14

Entire document, access to which is sought under Freedom of Information Act, is not exempt merely because isolated portion of document need not be disclosed. 5 U.S.C.A. § 552.

3. Records ⇐14

In proceedings for disclosure of government documents under Freedom of Information Act, mere conclusory affidavit by government agency that documents sought were of nature exempted from disclosure by provisions of Act was insufficient to establish exemptions claimed, and case would be remanded with directions that agency furnish detailed justification for exemption claims, that it itemize and index documents in such manner as to correlate justifications for refusal to disclose with actual portions of document claimed to be exempt, and that trial judge, in his discretion, might appoint special master to examine documents and evaluate agency's contentions of exemption. 5 U.S.C.A. §§ 552(a)(3), (b)(1, 2, 5, 6); 18 U.S.C.A. § 3500.

Ronald L. Plesser, Washington, D. C., with whom Alan B. Morrison, Washington, D. C., was on the brief, for appellant.

John C. Lenahan, Asst. U. S. Atty., with whom Harold H. Titus, Jr., U. S. Atty., John A. Terry and Derek I. Meier, Asst. U. S. Attys., were on the brief, for appellees.

Before ROBINSON and WILKEY, Circuit Judges, and FRANK A. KAUFMAN,* District Judge for the District of Maryland.

* Sitting by designation pursuant to 28 U.S.C. § 292(c).

WILKEY, Circuit Judge:

Appellant sought disclosure under the Freedom of Information Act [1] of various government documents, purportedly evaluations of certain agencies' personnel management programs. The District

1. "5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and proceedings*

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

"(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

Court denied disclosure, presumably on the ground the documents fell within one or more exemptions to the FOIA.[2] The scant record makes it impossible to determine if the information sought by appellant is indeed exempt from disclosure; we must remand the case to the trial court for further proceedings.

I. *Facts*

Overall responsibility to evaluate, oversee, and regulate the personnel management activities of the various federal agencies rests with the Civil Service Commission.[3] The Bureau of Personnel Management, the arm of the Civil Service Commission for this task, works with the agencies in evaluating their personnel management programs. After each evaluation is complete, the Bureau issues a report entitled Evaluation of Personnel Management. These evaluations assess the personnel policies of a particular agency and set forth recommendations and policies customarily adopted by both agencies and Commission.[4] Appellant, a law professor doing research into the Civil Service Commission, sought disclosure of these evaluations and certain other special reports of the Bureau of Personnel Management.[5]

The Director of the Bureau of Personnel Management Evaluation declined to release the documents sought.[6] This refusal to disclose was sustained by the Executive Director of the Civil Service Commission, who asserted that the information was exempt from disclosure because it (1) related solely to the internal rules and practices of an agency;[7] (2) constituted inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with

"(b) This section does not apply to matters that are—

"(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

2. The trial court below granted appellee's motion for summary judgment without giving any reasons for its action. We do not, therefore, know why the District Court found the documents to be exempt from disclosure.

3. *See* Exec.Order 9830 (24 Feb. 1947).

4. The documents under discussion are not a part of the record on appeal; the court does not, therefore, know precisely what is contained in the evaluations. Both parties, however, seem to agree that the general nature of the documents is as we have described them in the text. We may, therefore, accept this description for purposes of our discussion.

5. The documents other than the evaluations were described as "special studies of the Commission for fiscal years 1969–72." The exact nature of these "special studies" does not appear from the record, but it appears that they deal with the same general issues as do the evaluations.

6. Letter of Gilbert A. Schulkind (15 June 1972) (Joint App. at 15).

7. The FOIA provides that

this section does not apply to matters that are

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5 U.S.C. § 552(b)(2) (1970).

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the agency;[8] and (3) was composed of personal and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[9]

After this refusal appellant filed this action in the District Court, seeking injunctive relief and an order requiring disclosure of the requested materials in accordance with 5 U.S.C. § 552(a)(3) (1970). The Government filed a motion to dismiss, or in the alternative for summary judgment, in which it was contended that the reports fell within the three exemptions given above.

Aside from legal arguments, the sole support, regarding the contents of the documents and their exemption, of the Government's motion was an affidavit of the Director of the Bureau of Personnel Management Evaluation. This affidavit did not illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the FOIA. On the basis of this affidavit, the trial court granted the Government's motion for summary judgment. This appeal followed.

II. *Problems of Procedure and Proof under the Freedom of Information Act*

[1] The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself.[10] This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act.[11] By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove *de novo* in trial court that the information sought fits under one of the exemptions to the FOIA.[12] Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing informa-

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> This section does not apply to matters that are
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> inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5) (1970).

9. The FOIA provides that
> This section does not apply to matters that are
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> personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6) (1970).

10. *See* footnote 1, *supra*.

11. "The Legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." Getman v. N. L. R. B., 146 U.S.App.D.C. 209, 211, 450 F.2d 670, 672, stay denied, 404 U.S. 1204, 92 S.Ct. 7, 30 L.Ed.2d 8 (1971). *See also* Bristol-Myers v. F. T. C., 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970); M. A. Shapiro & Co. v. S. E. C., 339 F.Supp. 467, 469 (D.D.C.1972).

12. *See* 5 U.S.C. § 552(a)(3) (1970).

tion, and this case provides a classic example of such a situation. Here the Government contends that the documents contain information of a personal nature the disclosure of which would constitute an invasion of certain individuals' privacy. This factual characterization may or may not be accurate. It is clear, however, that appellant cannot state that, as a matter of his knowledge, this characterization is untrue. Neither can he determine if the personal items, assuming they exist, are so inextricably bound up in the bulk of the documents that they cannot be separated out. The best appellant can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such personal information.

E.P.A. v. Mink [13] differentiates between the action by the trial court called for when the factual nature of the disputed information is known and when it is not known. The first portion of the Supreme Court's decision dealt with documents the factual nature of which was not disputed; all parties agreed that the documents had been classified as "secret" by the President. The first exemption under the FOIA provides that documents which are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," are exempt from disclosure.[14] Since the factual nature of the documents was undisputed and since under this undisputed description of the documents they clearly fit within the exemption, the Court held that no further inquiry or argument was permitted; they need not be revealed.

A second group of documents considered by the Court in *Mink* had not been classified "secret." They were claimed to be exempt as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." [15] There was, however, a *factual* dispute regarding whether the documents actually fit this description. The Court concluded that, while material dealing with facts contained in such memoranda could be disclosed, memoranda dealing with law or policy were exempt. There was a still further *factual* dispute regarding how much of the material was factual, how much law or policy, and how much a combination of the two. With regard to this material which did not fit squarely within the language of the exemption, the Court remanded to the trial court to make a determination regarding the actual composition of the material.

The disputed information in this case is analogous to the second group of documents considered in *Mink*, in that on the record facts they do not indisputably fit within one of the exemptions to the FOIA. If the factual nature of the documents were so clearly established on the record, then the court would inquire no further and would make the legal ruling as to whether they fit within the defined exemption or exemptions. In this situation, in which there is a dispute regarding the nature of the information, the Supreme Court in *Mink* provided the outline of how trial courts should approach the job of making this factual determination.[16] Our discussion here is intended to be an elaboration of this outline.

This lack of knowledge by the party seeing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under

13. 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

14. 5 U.S.C. § 552(b)(1) (1970).

15. 5 U.S.C. § 552(b)(5) (1970).

16. In E. P. A. v. Mink, 410 U.S. 73, 92-93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court provided guidance for the trial court regarding when it should conduct an *in camera* examination. The Court made it clear that it was not always necessary for a court to conduct an *in camera* examination.

the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to the Act. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously an appellate court is even less suited to making this inquiry than is a trial court.

Here we are told that certain documents fall under three exemptions which permit the agencies to decline disclosure.[17] We do not know precisely how voluminous this information is, but from the general descriptions provided it seems reasonable to conclude that the documents run to many hundreds of pages. We could test the accuracy of the trial court's characterizations by committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.

[2] This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed.[18] Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.[19] It is quite possible that part of a document should be kept secret while part should be disclosed. When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.

Such an investment of judicial energy might be justified to determine some issues. In this area of the law, however, we do not believe it is justified or even permissible. The burden has been placed specifically by statute on the Government. Yet under existing procedures, the Government claims all it need do to fulfill its burden is to aver that the factual nature of the information is

17. *See* footnotes 7-9, *supra*.

18. This was made clear in E. P. A. v. Mink, 410 U.S. 73, 85-94, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). *See also* Sterling Drug v. F. T. C., 146 U.S.App.D.C. 237, 243, 450 F.2d 698, 704 (1971).

19. It may be, of course, that the exempt and the non-exempt portions are so inextricably intertwined that it is impossible to separate them. The issue of whether they are intertwined is, itself, a matter of fact which must be determined by the trial court as the trier of fact. *See* E. P. A. v. Mink, 410 U. S. 73, 92, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

such that it falls under one of the exemptions. At this point the opposing party is comparatively helpless to controvert this characterization. If justice is to be done and the Government's characterization adequately tested, the burden now falls on the court system to make its own investigation. This is clearly not what Congress had in mind.

In two definite ways the present method of resolving FOIA disputes actually *encourages* the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed.

First, there are no inherent incentives that would affirmatively spur government agencies to disclose information. Under current procedures government agencies *lose* very little by refusing to disclose documents. At most they will be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Secondly, since the burden of determining the justifiability of a government claim of exemption currently falls on the court system there is an innate impetus that encourages agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information. Let the court decide! And the tactical ploy is, to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased. If the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt. Thus, as a tactical matter, it is conceivable that an agency could gain an advantage by claiming overbroad exemptions.

The simple fact is that existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in an adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information. To possible ways of achieving this goal we now turn our attention.

III. *Procedures for Testing the Classification of Claims to Exemptions.*

A. *Detailed Justification*

[3] The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions,[20] such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be

20. This requirement is clearly mandated by the Supreme Court's language in *Mink*:

> An agency should be given the opportunity, by means of *detailed affidavits or oral testimony*, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material . . . . [subject to disclosure]. E. P. A. v. Mink, 410 U.S. 73, 93, 93 S.Ct. 827, 839, 35 L.Ed.2d 119 (1973) (emphasis added).

composed without excessive reference to the actual language of the document.[21]

B. *Specificity, Separation, and Indexing*

The need for adequate specificity is closely related to assuring a proper justification by the governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.[22]

Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list. When appealed, such an itemized ruling should be much more easily reviewed than would be the case if the government agency were permitted to make a generalized argument in favor of exemption.

The need for an itemized explanation by the Government is dramatically illustrated by this case. The Government claims that the documents, as a whole, are exempt under three distinct exemptions. From the record, we do not and cannot know whether a particular portion is, for example, allegedly exempt because it constitutes an unwarranted invasion of a person's privacy or because it is related solely to the internal rules and practices of an agency. While it is not impossible, it seems highly unlikely that a particular element of the information sought would be exempt under both exemptions. Even if isolated portions of the document are exempt under more than one exemption, it is preposterous to contend that all of the information is equally exempt under all of

21. In E. P. A. v. Mink, *ibid.*, the Supreme Court made the following relevant comment:

> [T]he Agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter.

In employing these techniques approved by the Court the agency should be careful that it does not discuss only the representative example while ignoring the bulk of the documents which may be disclosable. Such a course of action is not permissible under the Court's language in *Mink* and would lead to the undesirable result of sweeping disclosable material under a blanket allegation of exemption.

22. In our opinion in Sterling Drug, Inc. v. F. T. C., 146 U.S.App.D.C. 237, 450 F.2d 698 (1971), we remanded a FOIA case to the trial court because it was impossible to determine from the record if the trial court had considered whether all of the disputed information was exempt or whether part was exempt and part not. There we said:

> We must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendations of the Commission and its staff. However, there may be appendices or statements of facts which are clearly subject to disclosure. See Soucie v. David, 145 U.S.App. D.C. 144 at 155, 448 F.2d 1067 at 1078 (1971). We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

146 U.S.App.D.C. at 243, 450 F.2d at 704. This case is similar in that we have no way of determining the scope of the trial court's determination of exemption. From all that appears on the record, the trial judge's determination was that he found all information exempt under all three of the alleged exemptions. This inability to determine which exemptions apply to what portions of the information gives rise to the need for an adequate indexing system such as described above.

the alleged exemptions. It seems probable that some portions may fit under one exemption, while other segments fall under another, while still other segments are not exempt at all and should be disclosed. The itemization and indexing that we herein require should reflect this.

C. *Adequate Adversary Testing*

Given more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt documents themselves, a more adequate adversary testing will be produced. Respect for the enormous document-generating capacity of government agencies compels us to recognize that the raw material of an FOIA lawsuit may still be extremely burdensome to a trial court. In such cases, it is within the discretion of a trial court to designate a special master to examine documents and evaluate an agency's contention of exemption. This special master would not act as an advocate; he would, however, assist the adversary process by assuming much of the burden of examining and evaluating voluminous documents that currently falls on the trial judge.

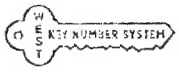
IV. *Conclusion*

Upon remand the Government should undertake to justify in much less conclusory terms its assertion of exemption and to index the information in a manner consistent with Part III above. The trial judge may, if he deems it appropriate, appoint a special master to undertake an evaluation of the information.

The procedural requirements we have spelled out herein may impose a substantial burden on an agency seeking to avoid disclosure. Yet the current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution—for agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.[23]

For the reasons given, the case is remanded for further proceedings consistent with this opinion.

So ordered.



Duane S. MARUSA, Appellant,

v.

DISTRICT OF COLUMBIA et al.

Nos. 72-1327, 72-1140.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 20, 1972.

Decided Aug. 21, 1973.

Shooting victim brought actions against the District of Columbia and its police chief and against bar owner seeking recovery for injuries sustained when he was shot by police officer with the

23. In this regard, administrative agencies should consider the example set by government investigative agencies following the passage of the Jencks Act. 18 U.S.C. § 3500 (1970). Confronted with a Congressional mandate to disclose information relevant to the testimony of witnesses in criminal trials, investigative agencies adopted procedures that assured proper disclosure. Investigative reports were prepared in a form in which the portions to which defense counsel should have access were easily removed from the file and made available to the defense counsel. Other parts of the file were kept segregated and relatively few problems were encountered.

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Remarks:

Per conversation.

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
OGC Registry 7 D07 Hqs	4/1/75

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FORM NO. 1-67 237 Use previous editions (40)

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EXECUTIVE SECRETARIAT

Routing Slip

TO:		ACTION	INFO	DATE	INITIAL
1	DCI		X		
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Remarks:

[redacted]

D/ Executive Secretary

03/14/75

Date

3637 (1-75)

25X1

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

PUBLIC AFFAIRS

8 MAR 1975

I-6

1, (MIF)

Honorable William E. Colby
Director, Central Intelligence Agency
Washington, D. C. 20505

Dear Mr. Colby:

Secretary Schlesinger has asked that I acknowledge your letter of February 24, 1975 concerning Freedom of Information requests from Morton Halperin. For your information, we have received four most difficult requests from Mr. Halperin, and we are doing everything possible to comply with these requests according to the new law.

We are developing a firm base of understanding with the Justice Department so that we will be able to move forward with fact should these inquiries prove to be intolerably disruptive to the function of our Department.

Sincerely,

Joseph Laitin

I-6

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

75-4819

24 FEB 1975

Honorable William E. Simon
Secretary of the Treasury
Washington, D. C. 20220

Dear Bill:

On 20 February we received five Freedom of Information requests from Morton Halperin, copies of which are attached. Those requests appear to have been carefully prepared with a view of seriously disrupting the functions of Government. I am also attaching an Agency letter to the Department of Justice suggesting a coordinated Executive branch approach since numerous other Halperin requests have been sent to your department and other agencies.

Sincerely,

W. E. Colby
Director

Attachments

cc: Secretary of State
Secretary of Defense
Director, OMB
Lt. Gen. Brent Scowcroft, USAF

WASHINGTON, D.C. 20505

24 FEB 1975

75-4819/1
(NIF)

Honorable Henry A. Kissinger
Secretary of State
Washington, D. C. 20520

Dear Henry:

On 20 February we received five Freedom of Information requests from Morton Halperin, copies of which are attached. Those requests appear to have been carefully prepared with a view of seriously disrupting the functions of Government. I am also attaching an Agency letter to the Department of Justice suggesting a coordinated Executive branch approach since numerous other Halperin requests have been sent to your department and other agencies.

Sincerely,

W. E. Colby
Director

Attachments

E I-6 (EXEC)

cc: Secretary of Defense
Secretary of the Treasury
Director, OMB
Lt. Gen. Brent Scowcroft, USAF

OGC:JSW:sin
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1 - DCI w/o/att
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CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

24 FEB 1975
24 FEB 1975

Honorable James R. Schlesinger
Secretary of Defense
Washington, D. C. 20301

Dear Jim:

On 20 February we received five Freedom of Information requests from Morton Halperin, copies of which are attached. Those requests appear to have been carefully prepared with a view of seriously disrupting the functions of Government. I am also attaching an Agency letter to the Department of Justice suggesting a coordinated Executive branch approach since numerous other Halperin requests have been sent to your department and other agencies.

Sincerely,

W. E. Colby
Director

Attachments

cc: Secretary of State
Secretary of the Treasury
Director, OMB
Lt. Gen. Brent Scowcroft, USAF

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

75 4819

24 FEB 1975

Lt. Gen. Brent Scowcroft, USAF
Deputy Assistant to the President
for National Security Affairs
The White House
Washington, D. C. 20500

Dear Brent:

On 20 February we received five Freedom of Information requests from Morton Halperin, copies of which are attached. Those requests appear to have been carefully prepared with a view of seriously disrupting the functions of Government. I am also attaching an Agency letter to the Department of Justice suggesting a coordinated Executive branch approach since numerous other Halperin requests have been sent to other departments and agencies.

Sincerely,

W. E. Colby
Director

Attachments

cc: Secretary of State
Secretary of Defense
Secretary of the Treasury
Director, OMB

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

22 February 1975

Antonin Scalia, Esq.
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D. C. 20530

Dear Mr. Scalia:

On February 20, CIA received five Freedom of Information requests from Morton Halperin, copies of which are enclosed. Several other agencies are known to have received duplicative, overlapping or related requests, among them being OMB, DIA, State, NSC and Treasury. Coordinated Executive branch consideration accordingly seems required, and to this end we suggest that the Justice Department Freedom of Information Committee or other Justice representatives convene a meeting on this problem as soon as possible, perhaps by Wednesday, February 26.

As to the specific requests to CIA, several of them are so all-inclusive -- specifically the two which contain long lists of categories of documents requested -- that final action within 10 days, or 10 weeks for that matter, is literally impossible. The request to CIA for NSC documents of course could be transferred to NSC. The fact that CIA is not authorized to release Mr. Colby's recent report to the President could be the answer to the request for that report. In addition, attachments to it are classified and other Freedom of Information exemptions undoubtedly apply to portions of it. CIA budgetary documents are classified and that could be the answer to the request for that one. (Incidentally, we also have a request for documents of this nature from [redacted] the individual in Pennsylvania who twice has sued the government alleging that the Treasury reporting of expenditures with respect to CIA funds is unconstitutional, which he lost on grounds of standing.)

25X1

The requester, Mr. Halperin, of course has to know that his requests cannot be finally acted on within 10 days. His multi-pronged requests surely are intended as harassment rather than as a serious and reasonable desire for documents. These requests clearly amount to a calculated, deliberate effort to hamstring agencies of the

government responsible for national security matters. This is particularly serious as to CIA, given the importance of its mission and having in mind the current investigations of CIA and intelligence activities by the Rockefeller Commission, two Select Congressional Committees, the Department of Justice and the Special Prosecutor. Perhaps the agencies should simply decline to attempt to deal with these requests piecemeal and instead allow themselves to be brought into court where they would rely on some sort of defense which asserts harassment and impossibility of compliance. We earnestly solicit your advice, assistance and ideas.

Sincerely,

[redacted] 25X1

John S. Warner
General Counsel

Enclosures

122 MARYLAND AVENUE, N. E.
WASHINGTON, D. C. 20002
(202) 544-5380

February 19, 1975

Freedom of Information Act Coordinator
Central Intelligence Agency
Washington, DC 20505

Dear Sir:

This is a request under the Freedom of Information Act as amended (5 U.S.C. §552).

I write to request copies of all of the files listed on the enclosed attachment. These are all files referred to in the Report by William Colby to the Senate Appropriations Committee on 15 January 1975.

(more)

FEB 20 5 13 PM '75

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such deletions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the information which you are not releasing.

I am prepared to pay costs specified in your regulations for locating the requested files and reproducing them.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interests because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the above number.

As provided for in the amended Act, I will expect to receive a reply within 10 working days.

Sincerely yours,

Morton H. Halperin

mhh/cmm

P.S. Should this letter leave you in any doubt, this is to advise you that this is an intended request as described in the Agency regulations. I believe that the procedure described in §1900.31(d) of the Agency regulations are not consistent with the language of the Freedom of Information Act which requires a response to a request within 10 working days and does not permit the Agency to add additional days to the time allowed. In any case, since I am informing you that this is a request under the FOIA and your regulations, there is no need for you to make such a determination and I will expect to receive a response to my request within 10 working days of your receipt of this letter.

ATTACHMENT A

1. NSC directive directing the CIA to conduct "clandestine counter-intelligence outside the United States."

2. NSC directive assigning to the CIA the task of maintaining central files and records of foreign counterintelligence information for the benefit of all interested agencies.

3. Directive establishing and defining the scope of the Domestic Operations Division.

4. Directive in 1972 changing name of Domestic Operations Division to Foreign Resources Division.

5. List of CIA "ostensibly private commercial and funding operations."

6. Copies of all damage assessments of leaks.

7. List of all damage assessments of leaks.

8. Directive of August 15, 1967 establishing a unit within the CIA Counterintelligence Office to look into the possibility of foreign leaks to American dissident elements.

9. All files of the unit described in #8.

10. All memoranda prepared by the unit described in #8 and sent outside the CIA.

11. Letter of August 29, 1967 from the executive director of the National Advisory Commission on Civil Disorders to the DCI.

12. Letter of September 1, 1967 from the DCI to the executive director of the National Advisory Commission on Civil Disorders.

13. Any and all attachments to #12.

14. Any and all material sent pursuant to #12 or otherwise by the CIA or the DCI to the National Advisory Commission on Civil Disorders.

15. All files relating to the CIA activitiy as part of "an interagency program, in support of the national commission, among others."

16. All CIA reports on the "foreign aspects of the antiwar, youth, and similar movements and their possible links to American counterparts.

17. Specific information disseminated to responsible U.S. agencies regarding "foreign aspects of the antiwar, youth and similar movements."

18. All files relating to September, 1969 directors review of the unit created on August 15, 1967 to look into possible foreign links to American dissident elements including but not limited to the memorandum in which the director states his belief that it was proper "while strictly observing the statutory and de facto proscriptions on agency domestic activities."

19. All CIA information supplied to the interagency evaluation committee coordinated by Mr. John Dean.

20. Files of the program conducted pursuant to the CIA involvement in the interagency evaluation committee.

21. Files of queries to overseas CIA stations and responses for information on foreign connections with Americans and information passed to FBI.

22. All files pertaining to the activities of about a dozen individuals recruited or inserted into American dissident circles.

23. All reports on the activities of American dissidents prepared by the individuals described in #22.

24. Directive issued in 1973 limiting the program described in #20 to collection abroad.

25. March 1974 memorandum by the director terminating the program described in #20.

26. Files developed in the program described in #20 on 10,000 American citizens.

27. All files relating to inserting 10 agents into dissident organizations in the D.C. area.

28. Reports made available to the FBI, Secret Service, and local police departments from the program described in #27.

29. Directive issued in December, 1968 terminating the program described in #27.

30. All lists "developed at various times in the past...which do appear questionable under CIA's authority."

31. May 9, 1973 directive from the director to all CIA employees requesting them to report any indication of any activity any of them might feel to be questionable.

32. All responses to the May 9, 1973 directive.

33. All files of the internal review generated by the responses described in #32.

34. Policy determinations and guidance issued in August, 1973 following investigation described in numbers 31-33.

35. Files related to three instances which could have been the basis for allegations of break-ins.

36. All files related to telephone taps against 21 residents of the United States between 1951-1965 including, but not limited to, authorizations by the Attorney General and the director.

37. All files of surveillance of CIA employees including but not limited to, three occasions in 1968, 1971, and 1972.

38. All files of surveillance of Americans not CIA employees including, but not limited to, surveillance in 1971 and 1972 against five Americans, and surveillance in connection with "a plot to kill the Vice President" in 1971 and 1972.

39. All files of programs to open and inspect mail including, but not limited to, surveillance involving "plot to kill the Vice President" and several programs conducted between 1953 and 1973.

40. All files of August, 1973 review of CIA assistance to other federal, state and local government components.

41. Memorandum issued in 1973 and each subsequent year directing all CIA employees to bring to the attention of the Director or the Inspector General any activity which they think may be beyond CIA's proper charter.

42. All responses received in response to the memoranda in #41.

43. Internal agency regulations and policy reflecting recommendations of the Katzenbach group.

44. Text of the report on CIA domestic activities given to the Chairmen of the Senate and House Armed Services Committees in May, 1973.

MORTON H. HALPERIN
122 MARYLAND AVENUE, N. E.
WASHINGTON, D. C. 20002
(202) 544-5380

February 19, 1975

Mr. Angus MacLean Thuermer
The Assistant to the Director
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Thuermer:

This is a request under the Freedom of Information Act as amended (5 U.S.C. §552).

I write to request the file containing the CIA Budget Authority for FY 1976 as approved by the President and included in the FY 1976 budget.

I also request the file containing the statement of expenditures of public money by the CIA for FY 1974.

(more)

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such deletions.

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February 19, 1975

Mr. Angus MacLean Thuermer
The Assistant to the Director
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Thuermer:

This is a request under the Freedom of Information Act as amended (5.U.S.C. §552).

I write to request a copy of all National Security Council Intelligence Directives (NSCIDs) sent to the CIA since 1948, including both those no longer in effect aw well as those currently in effect. I am making the same request to the NSC.

(more)

FEB 20 5 12 PM '75

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WASHINGTON, D. C. 20002
(202) 544-5380

February 19, 1975

Mr. Angus MacLean Thuermer
The Assistant to the Director
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Thuermer:

This is a request under the Freedom of Information Act as amended (5 U.S.C. §552).

I write to request a copy of the report on CIA domestic activities sent by Mr. William Colby to President Ford on or about January 1, 1975.

To avoid any possible misunderstanding of what is being requested, I enclose a copy of a newspaper story in which Presidential Press Secretary Ronald Nesson states that President Ford has received this report. My request includes any and all appendices, annexes, or other materials attached to the copy of the Report as transmitted to President Ford by Mr. Colby.

(more)

FEB 20 5 13 PM '75

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P. A3

Washington Post

CIA Report Said to Verify Charges

By Jack Nelson
Los Angeles Times

A report prepared by CIA Director William E. Colby for President Ford substantiates allegations that the agency has engaged in illegal domestic spying on American citizens, an informed government source said yesterday.

The source told the Los Angeles Times his information was that the Colby report shows that the CIA kept records on more than 9,000 Americans. He said he got his information from a CIA official who had access to the report.

"My information is that the report also confirms allegations that the CIA engaged in other clandestine domestic activities, including at least three illegal entries," the source said. "Two of the entries were against former CIA employees suspected of slipping over to the other side."

[The law authorizing the CIA states that the director "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."]

The 50-page Colby report was prepared on orders of Mr. Ford after The New York Times reported that the CIA had engaged in massive illegal domestic spying during previous administrations. It was delivered to the President Friday in Vail, Colo., where he is on a skiing vacation.

Mr. Ford has said he will not discuss the report or the CIA until after his return to Washington Thursday.

In another development, Reps. Phillip Burton (D-Calif.) and Elizabeth Holtzman (D-N.Y.) said that when Congress reconvenes June 16 they will introduce legislation to establish a special prosecutor's office and a select congressional committee to investigate allegations against the CIA.

Burton, chairman of the House Democratic Caucus, said the legislation also will be aimed at modifying the CIA's 1947 charter to strengthen its prohibitions against domestic spying by the agency.

In Vail, White House press secretary Ron Nessen refused to say whether the resignations of four top CIA counter-intelligence officers in recent days were linked to the allegations of domestic spying.

"If there is a CIA shakeup, has the President had any hand in it?" a reporter asked.

"He is not aloof from the topside of CIA," Nessen replied. "I can assure you he is aware of what is going on at CIA."

The Associated Press, meanwhile, reported it had learned that the name of at least one of the officers—counterintelligence chief James J. Angleton—was mentioned in "one draft" of the Colby report that went to the President.

Angleton, who has denied any involvement in illegal activities, was identified by The New York Times as overseer of the domestic spy operation.

[Also yesterday Sen. Hubert H. Humphrey, (D-Minn.) said he will ask Congress to create a permanent Joint Committee on National Security to oversee covert intelligence gathering operations.

[Humphrey said the proposed committee, composed of senior members of the House and Senate, would review all major national security issues and exercise a continuing oversight of the CIA and other intelligence agencies.]

122 MARYLAND AVENUE, N. E.
WASHINGTON, D. C. 20002

(202) 544-5380

February 19, 1975

Mr. Angus MacLean Thuermer
The Assistant to the Director
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Thuermer:

This is a request under the Freedom of Information Act as amended. (5 U.S.C. §552).

I write to request access, for the purpose of inspection and copying, to certain records of the Central Intelligence Agency.

The term "records" as used in this request means any and all written records, reports, directives, and any and all correspondence; logs; tapes and recordings of any kind, including recordings of telephone conversations; memoranda, including written memoranda of oral or telephonic communications; documents; files, including electronic surveillance files; and other writings or photographs.

I request any and all records created or recording activities which occurred during the period between January 1, 1950-December 31, 1974 which pertain to, refer to or discuss, in whole or in part, (1) domestic intelligence or counterintelligence activities and operations of the CIA within the United States; or (2) the surveillance of United States citizens, groups or organizations, including but not limited to "dissident" groups and individuals, within the United States and abroad.

This request includes but is not limited to files maintained by the following units: (a) the Counterintelligence Division including, but not limited to, the Special Operations Branch; (b) the Domestic Operations Division, including but not limited to the Records Integration Division and the D Staff (formerly Division); (c) the Technical Services Division; (d) the Domestic Contact Service or Domestic Contact Division; and (e) the Office of Security of the Central Intelligence Agency.

FEB 20 5 13 PM '75

This request also includes but is not limited to all such records which were (a) generated by staff officers, part-time consultants, contractees, stringers, or informers to the CIA in universities, labor unions, banks, or private corporations including but not limited to telephone companies such as AT&T and Southwestern Bell; (b) sent to or from the CIA and any federal agency or entity, including but not limited to the White House, the Department of Justice, the Secret Service, the FBI, the Postal Service (formerly the U.S. Post Office Department), and the IRS; (c) received from CIA personnel, employees or other intelligence services outside the United States which pertain to, refer to, discuss, or contain intelligence reports or comments on dissident United States citizens, groups or organizations for the period January 1, 1950 to December 31, 1974, including all reports received from Sal Ferrano; (d) received or obtained by the CIA and which are records of any and all electronic intercepts by the National Security Agency or any of its officers, personnel or employees.

This request also includes (a) all computer print outs or lists of names of American citizens identified by the CIA or others as politically "dissident"or "subversive" during the period 1950-1974 (provided that each individual on the list has been notified of the intended release and that the names of those objecting to release as an invasion of privacy have been deleted); (b) all material relating or referring to CIA assistance to, or work with, domestic metropolitan police departments of New York, New York; Chicago, Illinois; Washington, D.C.; Boston, Massachusetts, Fairfax County, Virginia; Montgomery County and Prince Georges County, Maryland; and of other states, cities, counties, or other jurisdictions within the United States during the period 1950-1974; (c) all material relating or referring to the establishment and operations of the Pacific Corporation, Southern Air Transport, Intermountain Aviation, Internation Police Services, Inc., Psychological Assessment Associates, and all other domestic corporations or associations owned or controlled or managed in whole or in part by the CIA which have functioned at any time and in any capacity as "cover organizations" for funds for any CIA intelligence or counterintelligence or surveillance or other covert activities in the United States during the period 1950-1974; (d) all material, including reports, office logs and telephone diaries relating or referring to the CIA's participation in, connection to, or knowledge of the break-in at Democratic Party Headquarters in Washington, D.C. on the evening of June 17, 1972 and all files compiled by, and on, Lee R. Pennington, Jr., former CIA employee; (e) all records which pertain to, refer to, reflect, or

discuss in whole or in part the CIA's assistance to, work with or contact with the White House special investigations unit (or "Plumbers") whose members included David Young, Egil Krogh, E. Howard Hunt, G. Gordon Liddy, Jr., Bernard L. Barker, Eugenio Martinez and Felipe deDiego, during the period June 14, 1971-June 17, 1972, including all records which record (1) contacts between the CIA and the "Plumbers," including logs and diaries; (2) which CIA offices, such as the National Office and the local offices in Miami, Las Vegas and Burlingame, California, assisted or worked with or engaged in contacts with the "Plumbers"; and (3) the kinds of CIA assistance and work provided to the "Plumbers."

This request also includes but is not limited to (a) the Report and appendices attached thereto on the domestic surveillance and other domestic activities of the CIA prepared by William Colby, Director of the CIA, and submitted to President Ford on or about December 27, 1974; (b) the files used in the compilation of the Report and annexes sent by Mr. William Colby to President Ford on or about December 27, 1974 on the subject of CIA domestic surveillance aw well as any files consulted in connection with the report; (c) all files given directly or indirectly to the President's Commission on CIA domestic activities; (d) all files listed in Attachment A; since these files are all alluded to in the statement by Director Colby released on January 15, 1975, there should be no difficulty locating them; (e) all files listed in Attachment B; these files are listed in the "Baker Report" on the CIA role in Watergate; and (f) the "Katzenbach" Report of 1967 and CIA files used in preparation of this report.

This request includes all records which pertain to, refer to, reflect, record or discuss in whole or in part the budget, costs, and expenditures for the various CIA domestic intelligence, counterintelligence and surveillance programs, operations and activities within the United States during the period of January 1, 1950-December 31, 1974, which activities are described (though not exclusively described) in the foregoing. This includes but is not limited to all expenditures on personnel, office space, equipment, files, office supplies, informers' fees and other overhead.

Because these files have been maintained in secret, I am not aware of how they are kept and I am not able to specify more precisely what files I am requesting. The amended Act provides, as you know, the requested files need only be reasonably described. The House Committee Report explains the meaning of the phrase as follows: "A 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." (No. 93-873, pp. 6-7). I am sure that you will agree that I have in the sense indicated by the House Committee Report reasonably described the files requested. If you have any doubt about whether a file is covered by the request, I would ask that you consider it included and release it to me. If you have difficulty locating any particular requested file, please provide access to those files which you can locate.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of any requested file are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such deletions.

If you determine that some or all of the files are exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the material which you are not releasing.

I am prepared to pay reasonable costs for locating the requested files.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

As provided for in the amended Act, I will expect to receive a reply within 10 working days.

Sincerely yours,

Morton H. Halperin

mhh/cmm
enclosures
cc: William Dobrovir, Esq.

P.S. Should this letter leave you in any doubt, this is to advise you that this is an intended request as described in the Agency regulations. I believe that the procedure described in S1900.31(d) of the Agency regulations are not consistent with the language of the Freedom of Information Act which requires a response to a request within 10 working days and does not permit the Agency to add additional days to the time allowed. In any case, since I am informing you that this is a request under the FOIA and your regulations, there is no need for you to make such a determination and I will expect to receive a response to my request within 10 working days of your receipt of this letter.

ATTACHMENT A

1. NSC directive directing the CIA to conduct "clandestine counter-intelligence outside the United States."

2. NSC directive assigning to the CIA the task of maintaining central files and records of foreign counterintelligence information for the benefit of all interested agencies.

3. Directive establishing and defining the scope of the Domestic Operations Division.

4. Directive in 1972 changing name of Domestic Operations Division to Foreign Resources Division.

5. List of CIA "ostensibly private commercial and funding operations."

6. Copies of all damage assessments of leaks.

7. List of all damage assessments of leaks.

8. Directive of August 15, 1967 establishing a unit within the CIA Counterintelligence Office to look into the possibility of foreign leaks to American dissident elements.

9. All files of the unit described in #8.

10. All memoranda prepared by the unit described in #8 and sent outside the CIA.

11. Letter of August 29, 1967 from the executive director of the National Advisory Commission on Civil Disorders to the DCI.

12. Letter of September 1, 1967 from the DCI to the executive director of the National Advisory Commission on Civil Disorders.

13. Any and all attachments to #12.

14. Any and all material sent pursuant to #12 or otherwise by the CIA or the DCI to the National Advisory Commission on Civil Disorders.

15. All files relating to the CIA activitiy as part of "an interagency program, in support of the national commission, among others."

16. All CIA reports on the "foreign aspects of the antiwar, youth, and similar movements and their possible links to American counterparts.

17. Specific information disseminated to responsible U.S. agencies regarding "foreign aspects of the antiwar, youth and similar movements."

18. All files relating to September, 1969 directors review of the unit created on August 15, 1967 to look into possible foreign links to American dissident elements including but not limited to the memorandum in which the director states his belief that it was proper "while strictly observing the statutory and de facto proscriptions on agency domestic activities."

19. All CIA information supplied to the interagency evaluation committee coordinated by Mr. John Dean.

20. Files of the program conducted pursuant to the CIA involvement in the interagency evaluation committee.

21. Files of queries to overseas CIA stations and responses for information on foreign connections with Americans and information passed to FBI.

22. All files pertaining to the activities of about a dozen individuals recruited or inserted into American dissident circles.

23. All reports on the activities of American dissidents prepared by the individuals described in #22.

24. Directive issued in 1973 limiting the program described in #20 to collection abroad.

25. March 1974 memorandum by the director terminating the program described in #20.

26. Files developed in the program described in #20 on 10,000 American citizens.

27. All files relating to inserting 10 agents into dissident organizations in the D.C. area.

28. Reports made available to the FBI, Secret Service, and local police departments from the program described in #27.

29. Directive issued in December, 1968 terminating the program described in #27.

30. All lists "developed at various times in the past...which do appear questionable under CIA's authority."

31. May 9, 1973 directive from the director to all CIA employees requesting them to report any indication of any activity any of them might feel to be questionable.

32. All responses to the May 9, 1973 directive.

33. All files of the internal review generated by the responses described in #32.

34. Policy determinations and guidance issued in August, 1973 following investigation described in numbers 31-33.

35. Files related to three instances which could have been the basis for allegations of break-ins.

36. All files related to telephone taps against 21 residents of the United States between 1951-1965 including, but not limited to, authorizations by the Attorney General and the director.

37. All files of surveillance of CIA employees including but not limited to, three occasions in 1968, 1971, and 1972.

38. All files of surveillance of Americans not CIA employees including, but not limited to, surveillance in 1971 and 1972 against five Americans, and surveillance in connection with "a plot to kill the Vice President" in 1971 and 1972.

39. All files of programs to open and inspect mail including, but not limited to, surveillance involving "plot to kill the Vice President" and several programs conducted between 1953 and 1973.

40. All files of August, 1973 review of CIA assistance to other federal, state and local government components.

41. Memorandum issued in 1973 and each subsequent year directing all CIA employees to bring to the attention of the Director or the Inspector General any activity which they think may be beyond CIA's proper charter.

42. All responses received in response to the memoranda in #41.

43. Internal agency regulations and policy reflecting recommendations of the Katzenbach group.

44. Text of the report on CIA domestic activities given to the Chairmen of the Senate and House Armed Services Committees in May, 1973.

ATTACHMENT B

1. All Martinez case officer contact reports (1971-July, 1972).

2. All CIA correspondence re: Martinez car (cables, etc.).

3. All reports or memoranda relating to the debriefing of Martinez' last case officer upon his return to Washington, D.C., after the Watergate break-in.

4. Any and all reports of contacts between [Mullen and Company Case Officer] and Mullen, Bennett, Hunt and anyone else at Mullen and Company from April 30, 1970 to January 1, 1974, including but not limited to logs, records, or memoranda reflecting such contact or the content of that contact.

5. "Mr. Edward" file -- The file containing all memoranda and other materials relating to the CIA's TSD support of Hunt.

6. All memoranda prepared by [Executive Officer to Director of Security], or any other CIA employee, regarding the TSD support of Hunt, including not limited to all internal memoranda concerning the TSD support which not contained in the "Mr. Edward" file.

7. All information received by the CIA from the FBI or the White House which served as raw data for preparation of both psychological profiles of Ellsberg.

8. all documents, reports, or memoranda relating in any way to the psychological profiles, including but not limited to the internal memoranda prepared by [Chief Psychiatrist], [DMSS], and [DDS] regarding the two psychological profiles.

9. The so-called "psychological profile files," presently located in the office of the Director of Medical Services, CIA, containing all materia regarding the preparation of the psychological profiles.

10. Special Watergate file formerly maintained in the Office of Security, now under control of the Inspector General.

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Honorable Henry A. Kissinger
Secretary of State
Washington, D. C. 20520

Dear Henry:

On 20 February we received five Freedom of Information requests from Morton Halperin, copies of which are attached. Those requests appear to have been carefully prepared with a view of seriously disrupting the functions of Government. I am also attaching an Agency letter to the Department of Justice suggesting a coordinated Executive branch approach since numerous other Halperin requests have been sent to your department and other agencies.

Sincerely,

W. E. Colby
Director

Attachments

cc: Secretary of Defense Schlesinger
Secretary of Treasury Simon
Director of OMB Ash
Maj. Gen. Brent Scowcroft, USAF

OGC:JSW:sin
Original - Addressee
1 - DCI w/o/att
1 - DDCI w/o/att
1 - ER via Ex Secty w/o/att
1 - C/IRS w/o/att
1 - OGC w/o/att

☐ UNCLASSIFIED ☐ INTERNAL USE ONLY ☐ CONFIDENTIAL ☐ SECRET

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Morton H. Halperin - FOI Request

FROM:	EXTENSION	NO.
Deputy Inspector General 2E24 Hqtrs. Bldg.		DATE 31 MAR 1975

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Executive Secretary 7E12 Hqtrs. Bldg.		4 April		1 to 3: Mr. Halperin did not specifically request this material, but in any event it should not be provided him under any circumstances. P.S. I'm curious why you ask me to vote on two internal IG memos (390 and 397).
2.				
3. Mr. S. Breckinridge 2 E 24 Hqs. Bldg.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				

Executive Registry
75-4814/4

25X1

25X1

I.C. Evans
4 April 1975

I-6

FORM 3-62 610 USE PREVIOUS EDITIONS ☐ SECRET ☐ CONFIDENTIAL ☐ INTERNAL USE ONLY ☐ UNCLASSIFIED

SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

UNCLASSIFIED | CONFIDENTIAL | SECRET

OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	The Director		
2			
3			
4			
5			
6			

	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

25X1

This is ready for your signature with a minor change as indicated by [redacted] on the cover sheet. The deadline of 5 September is not absolute since we are not under court order and we are not going to get this to Justice until Monday anyway.

25X1

[redacted]
Acting General Counsel

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
	9/5/75

UNCLASSIFIED | CONFIDENTIAL | SECRET

ROUTING AND RECORD SHEET

Executive Registry
75-11285

SUBJECT: (Optional)

Your Answers to Plaintiff's Interrogatories in Halperin v. Colby

FROM:	EXTENSION	NO.
25X1 [redacted]/OGC 7D07 Hqs.		DATE 5 September 1975 25X1

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. The Director				Sir:
2.				Per your request, we have checked the information to support your statement (on page 5 of the attached) regarding Soviet efforts against the U-2.
3.				
4.				[redacted] Special Assistant to Defensive Systems Division, OWI, recalls that the Soviets first deployed improved high altitude radar and SA-2's some time after the U-2's started flying. While this does not constitute absolute proof that these Soviet actions were specifically triggered by the appearance of the U-2's, the evidence is sufficient to support your statement. 25X1
5.				
6.				
7.				
8.				
9.				Mr. Proctor concurs but suggests that, inasmuch as there is room for a difference of opinion on this matter, it would be preferable to say "I am sure" rather than "I have no doubt." We have redrafted accordingly. 25X1
10.				
11.				
12.				[redacted] 25X1
13.				Assistant General Counsel
14.				I-6 [redacted]
15.				

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, Plaintiff,	)	
v.	)	Civil Action No. 75-0676
WILLIAM E. COLBY, et al., Defendants.	)	

DEFENDANTS' ANSWERS TO PLAINTIFF'S INTERROGATORIES

Pursuant to Rule 33 FED. R. CIV. P. Defendants submit their answers to Plaintiff's interrogatories as follows:

(1) State whether the following lump sum figures are recorded or contained within files or records in the custody or control of the Director of Central Intelligence (hereafter "the DCI") and/or the Central Intelligence Agency (hereafter "the CIA"):

(a) the CIA Budget Authority for Fiscal Year 1976, as approved by the President and included in the Fiscal Year 1976 budget [hereafter "the lump sum 1976 budget"];

(b) the statement of expenditures of public money by the CIA for Fiscal Year 1974 [hereafter "the lump sum 1974 expenditures"].

Answer

(a) The DCI has custody of the Fiscal Year 1976 budget submission as approved by the President, but it has not yet been voted on by the Congress.

(b) Yes.

(2) If either or both of the foregoing items of information are not contained within files or records in the custody or control of the DCI and/or the CIA, please identify the person or agency having custody or control over any such files or records.

Answer

Not applicable.

(3) State whether there are files or records within the custody or control of the DCI and/or the CIA containing numerical figures the sums of which equal or approximate:

(a) the lump sum 1976 budget;

(b) the lump sum 1974 expenditures.

Answer

(a) The DCI has custody of the Fiscal Year 1976 budget submission as approved by the President, but it has not yet been voted on by the Congress.

(b) Yes.

(4) If the DCI and/or the CIA does not have custody or control of the files or records identified in the foregoing Interrogatory, please identify the person or agency having custody or control of any such files or records.

Answer

Not applicable.

(5) State whether the letter to the plaintiff of April 17, 1975, signed by John F. Blake and appended as Exhibit H to the Complaint [hereafter "the Blake letter"], reflects a final determination by the DCI and/or the CIA that the following items of information are exempt from disclosure under the Freedom of Information Act:

(a) the lump sum 1976 budget;

(b) the lump sum 1974 expenditures.

Answer

(a) Yes.

(b) Yes.

(6) If your answer to either or both parts of the foregoing Interrogatory in affirmative, please set forth any different or additional basis for the claim(s) of exemption not contained in Exhibit H to the Complaint.

Answer

50 U.S.C. 403j.

(7) Do you in fact contend that release of (a) the lump sum 1976 budget; and (b) the lump sum 1976 [sic] expenditures could reasonably be expected to (separately with respect to each):

(i) cause damage to the national security;

(ii) damage intelligence sources and methods?

Answer

(i) Yes.

(ii) Yes.

(8) If your answer to any part of the foregoing Interrogatory is affirmative, please state the detailed factual basis for your answer(s).

Answer

Publication of either the CIA budget or the expenditures made by CIA for any given year would show the amounts planned to be expended or in fact expended for objects of a confidential, extraordinary or emergency nature. This information would be of considerable value to a potentially hostile foreign government. For example, if the total expenditures made by the Agency for any particular year were publicized, these disclosures, when taken with other information publicly available and thus presumed to be known to other governments' intelligence services, would enable such governments to refine their estimates of the activities of a major component of the United States intelligence community, including specifically the

personnel strength, technological capabilities, clandestine operational activities, and the extent of the United States Government intelligence analysis and dissemination machinery. Thus this information being made available to other intelligence services would enable a potentially hostile government to refine its estimates of the amount of funds expended by CIA for those activities. The subsequent publication of similar data for other fiscal years, which would inevitably result if a precedent were established for the release of such data for any one year, would enable a potentially hostile power to refine its estimates of trends in the United States Government intelligence efforts. The business of intelligence is to a large extent a painstaking collection of data and the formation of conclusions utilizing a multitude of bits and pieces of information. The revelation of one such piece, which might not appear to be of significance to anyone not familiar with the process of intelligence analysis (and which, therefore, might not arguably be said to be damaging to the national security) would, when combined with other similar data, make available to the intelligence analyst of a potentially hostile power information of great use and which would result in significant damage to the national security of the United States. For example, if it were learned that CIA expenditures have increased significantly in any one given year, but that there has been no increase in Agency personnel (apparent from traffic, cars in the parking lots, etc.) it would be possible to make some reasonable estimates and conclusions to the effect that, for example, CIA had developed a costly intelligence collection system which is technological rather than manpower intensive; and that such system is operational. Knowledge readily available at the time about reconnaissance aircraft, photography and other technology, can result in an accurate analysis about a new collection system which would enable a potentially hostile power to take steps to counter its effectiveness. As I stated before the Congress on August 4, 1975,

the development of the U-2 aircraft as an effective collection device would not have been possible if the CIA budget had been a matter of public knowledge. Our budget increased significantly during the development phase of that aircraft. That fact, if public, would have attracted attention abroad to the fact that something new and obviously major was in process. If it had been supplemented by knowledge (available perhaps from technical magazines, industry rumor, or advanced espionage techniques) that funds were being committed to a major aircraft manufacturer and to a manufacturer of sophisticated mapping cameras, the correct conclusion would have been simple to draw. The U.S. manufacturers in question, their employees and their suppliers and subcontractors would have become high priority intelligence targets for foreign espionage. And I am sure that the Soviets would have taken steps earlier to acquire a capability to destroy very-high-altitude aircraft. They did indeed take these steps, with eventual success, but only some time after the aircraft began operating over their territory--that is, once they had knowledge of a U.S. intelligence project.

Release of a single year budget figure alone would inevitably lead to demands for more detailed breakdowns by component or activity for monies appropriated or spent and could result in unauthorized disclosures of such additional information with cumulative damage to the national security.

The explanation and justification for the need for secrecy of the Agency budget has been explained by me in the terms set forth above to the Congress. On several occasions, according to my personal knowledge, similar explanations have been made to the Congress respecting the need for secrecy in CIA financial matters by prior Directors of Central Intelligence. The CIA budget and the amount of CIA expenditures have remained secret from the inception of the Agency in 1947 until now. The recent reaffirmation

of congressional expression in this matter is the rejection of an amendment to the Defense Appropriations Act of 1974, which would have required the publication of the aggregate budget of the intelligence community. See, 120 CONG. REC. S 9601 (daily ed. June 4, 1974).

(9) Do you in fact contend that release of (a) the lump sum 1976 budget; and (b) the lump sum 1974 expenditures would disclose (separately with respect to each):

(i) the organization of personnel employed by the CIA;

(ii) the names of personnel employed by the CIA;

(iii) the functions of personnel employed by the CIA;

(iv) the official titles of personnel employed by the CIA;

(v) the salaries of personnel employed by the CIA;

(vi) the numbers of personnel employed by the CIA?

Answer

The release of only the lump sum 1976 budget or only the lump sum 1974 expenditures would not disclose precisely any of the items enumerated in the six (6) subparagraphs, but would be damaging to the national security for the reasons stated in answer to the prior interrogatory.

(10) If your answer to any part of the foregoing Interrogatory is affirmative, please state the detailed factual basis for your answer(s).

Answer

Not applicable.

(11) Please set forth in detail any and all criteria employed by the DCI to determine whether release of information by the CIA would damage intelligence sources and methods.

Answer

In general, the Central Intelligence Agency does not make public information which would reveal or tend to reveal the identity of an intelligence source or the existence of an intelligence method because such disclosure

would render the source or method useless or, at the very least, less effective. Accordingly, the criteria used to determine whether the release of information would damage a source or method is whether it would aid in the identification of such source or method.

(12) Please describe in detail any evidence in your possession that, prior to the CIA's receipt of plaintiff's request, the following information was in fact kept secret according to criteria for exercising the Director's authority pursuant to 50 U.S.C. 403(d)(3), 50 U.S.C. 403f(a) or 50 U.S.C. 403g:

(a) the lump sum 1976 budget;

(b) the lump sum 1974 expenditures.

Answer

All documents which include the lump sum figures for the 1976 budget and 1974 expenditures bear classification markings pursuant to Executive Order 11652 and have not been publicly disclosed.

(13) Please provide a detailed list of the records referred to in the Blake letter (Complaint, Exhibit H), with an index indicating for each record:

(a) what portions may be released;

(b) what portions must be deleted;

(c) what statutory exemption or other legal basis is relied upon for each document withheld or portion thereof deleted.

Answer

Letter, dated January 30, 1975 from Roy L. Ash, Director, Office of Management and Budget, to William E. Colby, advising that the President has approved the 1976 budget allowance for the Central Intelligence Agency for a stated sum. This document bears the legend "SECRET" and further indicates that the classifying officer is the Director, OMB; that it is exempted from the General Declassification Schedule pursuant to paragraph 5B(2) of Executive Order 11652 and that the date on which it can be declassified is impossible to determine.

Certifications executed by Vernon A. Walters, Deputy Director of Central Intelligence, on September 23, 1974, May 6, 1974, March 19, 1974 and November 12, 1974. Each certificate certifying the expenditure of stated sums for the appropriate quarter of the fiscal year 1974. These documents: (1) bear the legend "SECRET," (2) identifies the classifying officer by 058320, (3) recites that it is exempted from the declassification schedule, (4) bears the legend that there are "sensitive sources and methods involved," and (5) states that the date on which it can be declassified is impossible to determine.

(a) None .

(b) All.

(c) 5 U.S.C. 522(b)(1); 5 U.S.C. 552(b)(3); Executive Order 11652; 50 U.S.C. 403(d)(3); 50 U.S.C. 403f(a); 50 U.S.C. 403g; 50 U.S.C. 403j.

(14) Please set forth the texts and dates of any and all written or oral statements by William E. Colby, any former Director of Central Intelligence, or other officials of the CIA concerning the consequences of release of some or all of the CIA's budget, including the release of a lump sum annual figure.

Answer

See representative exhibits attached.

William E. Colby

STATE OF VIRGINIA)
) ss.
COUNTY OF FAIRFAX)

On this 5 day of [illegible], 1975 before me appeared William E. Colby, by me personally known, and being first duly sworn did state that the above and foregoing answers were made on behalf of the defendants and that the same were true to the best of his knowledge, information and belief.

Notary Public

My commission expires My Commission Expires September 29, 1976.

Statement

by

W. E. Colby

Director of Central Intelligence

before

House of Representatives

Select Committee on Intelligence

August 4, 1975

would be unaware of many of these steps. We could face the surprise with which the world received the news of the first Sputnik. We could be years behind in the development of appropriate countermeasures to a new weapons system. We would have large areas of uncertainty about Soviet forces which could argue for excessive U. S. defense expenditures as insurance. Most of all, we would be unable to negotiate, agree upon and monitor limits on such systems such as SALT to bring about a more stable world.

In this investigation, Mr. Chairman, you will discover the revolutionary advances which have been made in our technical, analytical and operational intelligence activities by the member agencies of the American Intelligence Community. I believe you will find these investments necessary to our country, their products of great value, and the budgets carefully managed and proper.

Now, Mr. Chairman, with respect to the specific figures of the Community budget, I regret that I must ask you to go into executive session for this aspect of my testimony.

On July 25th, at your request, you were briefed with respect to the budget of the Intelligence Community in general and that of the CIA in

particular. I would be pleased to give a similar briefing to all members of the Committee and answer any questions they may have. I respectfully request, however, that such testimony be given in executive session.

In making this request, I am mindful of the need for the Intelligence Community to win the confidence of the American people, and I am aware that a request to present a portion of my testimony "behind closed doors" appears to run counter to such an objective. Nonetheless, I believe the request is in conformity with the Constitution, the laws, and the long-established Congressional procedures. I also believe it proper and just.

As you know, I am bound by law to protect the foreign intelligence sources and methods of this nation.[1] I am, like the members of this Committee, bound by my oath of office and by my own conscience to carry out the duties assigned to me -- including that one -- as fully and effectively as possible. The issue of whether the budget should remain secret is a fair one for debate, and I welcome this opportunity to be heard on it.

---

[1] 50 U.S.C.A. §403(d)(3), §403(g); 18 U.S.C.A. §798; E.O. 11652, March 10, 1972.

It is clear from the legislative history of CIA's enabling legislation that the Congresses of the post-World War II period believed that the financial transactions related to intelligence simply had to remain outside of public gaze. Subsequent Congresses have consistently reaffirmed that position over the years -- most recently in the Senate last June, when a proposed amendment requiring release of an annual budget figure for intelligence was rejected by a vote of 55 to 33. Both Houses of Congress also have adopted internal rules designed to provide for a combination of detailed Congressional oversight of Agency activities and maximum protection of sensitive information about Agency operations.

Existing laws and procedures are a focal point of your current investigations and hearings. When this Committee and the Senate Select Committee complete their proceedings and submit their recommendations, the Congress may decide to change the ground rules under which we operate. If that happens, we will of course conform. But I must testify that I believe that the Agency's budget must be kept secret and that revealing it would inevitably weaken our intelligence.

Many have contended that the secrecy of the Agency budget is in conflict with Article 1, Section 9, Clause 7, of the Constitution, which states that " No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[2]

In fact, that very clause of the Constitution was settled on after debates in the Constitutional Convention that are part of another, less widely understood American practice -- that concealment of certain expenditures can be in the public interest. The so-called "Statement and Account" clause just quoted was not part of the initial draft. The language first suggested by George Mason would have required an annual account of public expenditures. James Madison, however, argued for making a change to require reporting "from time to time." Madison explained that the intent of his amendment was to "leave enough to the discretion of the Legislature." Patrick Henry opposed the Madison

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[2] As noted by the Supreme Court in U. S. v. Richardson, ___U. S. __, 41 L. Ed. 678, (1974), "Congress has taken notice of the need of the public for more information concerning governmental operations but at the same time it has continued traditional restraints on disclosure of confidential information. See: Freedom of Information Act, 5USC §552; Environmental Protection Agency v. Mink, 410 U. S. 73 (1973)" at 687.

language because it made concealment possible. But when the debate was over, it was the Madison view that prevailed. And the ability of the drafters of the Constitution to envisage a need for concealment is further indicated by Article 1, Section 5, Clause 3: "Each House shall keep a Journal of its proceedings and from time to time publish the same, except such Parts as may in their Judgment require Secrecy."

The option of confidential expenditures was given to Congress; it was first exercised at the request of President Washington, who in his first annual message sought a special fund for intelligence activites. Congress agreed and provided for expenditures from the fund to be recorded in the "private journals" of the Treasury. A later Congress passed a secret appropriation act providing necessary funds to enable President Madison to take possession of parts of Florida. President Polk used secret funds to send "ministers" to Central America to gather information. Many aspects of budgets have been kept confidential throughout our history and intelligence activities have consistently received special treatment. In this respect, they are similar to other well-established American secrets -- of the ballot box, of grand jury proceedings, of diplomatic negotiations, and many more. If secrecy is required to enable an important process to work, we Americans accept it. Intelligence is such a process -- it is important to our country, and it will not work if it is exposed.

Confidentiality about information having to do with intelligence organizations and their activities is a world-wide practice. A check on our part has not turned up even one example of a government that publishes its intelligence budget. There are intelligence organizations in Western democracies that are not in any way accountable to their legislatures. Indeed two newspaper editors were jailed in Sweden a couple of years ago for publishing the fact that Sweden has an intelligence service and that it had relations with the United States.

I do not refer to these foreign examples to urge that we copy them. We Americans want a responsible American intelligence service. Thus, CIA's practice is far different from the foreign examples. Our relationships with the Hill have been close over the years and oversight is far more extensive than may be realized. As the 94th Congress has organized itself, four subcommittees with a total of 38 members have oversight responsibilities for CIA. Under existing guidelines, operational activities are reported solely to them (except that, pursuant to PL 93-559, ongoing covert actions are also reported to the two foreign relations committees). I hold no matters secret from the oversight committees; instead, I have and exercise a responsibility to volunteer to them matters of possible interest. On substantive intelligence questions, I appear before many committees -- notably those dealing with military and foreign affairs, atomic energy, and space.

In the first seven months of this year, I appeared personally before Congressional Committees some 39 times. So far as the Agency budget alone is concerned, I have made two presentations to the Defense Subcommittee of the House Appropriations Committee and one each to the Congressionally designated subcommittee of the House Armed Services, Senate Armed Services and Senate Appropriations Committees. Additionally, I reported to them on the Community budget. And my formal budget appearances are only the most prominent part of the fiscal exchange. I frequently answer questions on the budget during appearances on other matters. A very large number of my subordinates brief Congressional bodies on various aspects of their activities. In connection with appropriations processes, we have so far provided written answers to well over a hundred Congressional questions on the FY 1976 budget for the Agency.

My emphasis on the worldwide and American practice of treating intelligence budgets as secret is not an argument for concealing the CIA budget from a strong oversight mechanism. This I have welcomed on many occasions, as I believe it an important element of the responsible intelligence service we Americans must have. The better the external supervision of CIA, the better its internal management will be, to the benefit of all Americans.

Instead, the need for a secret budget reflects the widespread conviction on the part of intelligence professionals, grounded in their intelligence experience, that public revelation of fiscal information would inevitably hurt our intelligence effort. The publication of a total budget figure for a single year, without more, might not be thought to be a calamity. But limiting the public record in that way is not practical. The precedent would be established under which we would at the very least have to reveal a budget total each year. A trend line would be established, and a not-so-hypothetical intelligence analyst in another country would have something to work with. And there are intelligence analysis techniques that could easily be applied to such data.

Look at this problem as we in intelligence look at foreign problems. For example, the Chinese have not published the value of their industrial production since 1960. But they have published percentage increases for some years without specifying the base, both for the nation and most of the provinces. It took one key figure to make these pieces useful: when the Chinese reported that the value of industrial production in 1971 was 21 times that of 1949, we could derive an absolute figure for 1971. With this benchmark, we could reconstruct time series both nationally and province by province. If we begin releasing intelligence budget figures, others will be able to take scraps of information about the Agency and

generally known financial trends such as inflation, and use a similar kind of analysis to draw conclusions or even identify hypotheses that would put some of our operations in jeopardy.

For example, let us look at the development of the U-2. Our budget increased significantly during the development phase of that aircraft. That fact, if public, would have attracted attention abroad to the fact that something new and obviously major was in process. If it had been supplemented by knowledge (available perhaps from technical magazines, industry rumor, or advanced espionage techniques) that funds were being committed to a major aircraft manufacturer and to a manufacturer of sophisticated mapping cameras, the correct conclusion would have been simple to draw. The U. S. manufacturers in question, their employees and their suppliers and subcontractors would have become high priority intelligence targets for foreign espionage. And I have no doubt that the Soviets would have taken early steps to acquire a capability to destroy very-high-altitude aircraft -- steps they did indeed take, with eventual success, but only some time after the aircraft began operating over their territory -- that is, once they had knowledge of a U. S. intelligence project.

Moreover, once the budget total was revealed, the demand for details probably would grow. What does it include? What does it exclude? Why did it go up? Why did it go down? Is it worth it? How does it work?

There would be revelations -- even revelations of facts not in themselves particularly sensitive but which would gradually reduce the unknown to a smaller and smaller part of the total, permitting foreign intelligence services to concentrate their efforts in the areas where we would least like to attract their attention. We -- and I specifically mean in this instance both intelligence professionals and Members of Congress -- would have an acute problem when the matter of our budget arose on the floor of the House or Senate. Those who knew the facts would have two unpleasant choices -- to remain silent in the face of all questions and allegations, however inaccurate, or to attempt to keep the debate on accurate grounds by at least hinting at the full story.

My concern that one revelation will lead to another is based on more than a "feeling." The atomic weapons budget was considered very sensitive, and the Manhattan project was concealed completely during World War II. With the establishment of the AEC, however, a decision was made to include in the 1947 budget a one-line entry for the weapons account. That limitation was short-lived. By 1974, a 15-page breakout and discussion of the atomic weapons program was being published. Were the intelligence budget to undergo a similar experience, major aspects of our intelligence strategy, capabilities and successes would be revealed. The obvious result would be a tightening of security practices by hostile, secretive, closed

foreign nations to deprive us of the knowledge we would otherwise obtain about their plans and capabilities to hurt us and our allies.

In summary, Mr. Chairman, I have tried to view this question dispassionately, as both an American and an intelligence official. I would like to be able to tell the American people about our activities. There is a great deal about the best intelligence service in the world we would be proud to tell, to bring into perspective what we have had to say recently about the missteps or misdeeds in our past. I am a long way from being an advocate of secrecy for the sake of secrecy; we have deliberately opened as much of our intelligence effort for public inspection as we can -- during this past year, for example, we have briefed and answered the questions of some 10,000 members of our public, from community leaders to the press to visiting high school groups.

But I do not believe that there is any Constitutional or legal requirement that our budget be publicly revealed. Doing so would inevitably hurt our intelligence product. It is reviewed privately in depth and in detail in the Executive Branch and in the appropriate Committees of the Congress. Knowledge of the Agency budget would not enable the public to make a judgment on the appropriateness of the amount without the knowledge of the product and the ways it is obtained. And such exposure to our citizens could not be kept from potential foreign foes, who, thus alerted, would

prevent us from obtaining the intelligence we need to protect ourselves in the world today. We have lost intelligence opportunities through exposure already. I believe it is my job under the statute to prevent this, so I urge that our intelligence budgets be kept secret and be discussed by this Committee only in executive session.

THE DIRECTOR OF CENTRAL INTELLIGENCE
WASHINGTON, D. C. 20505

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3 JUL 1975

COMPT 75-0891

The Honorable John C. Stennis, Chairman
Armed Services Committee
United States Senate
Washington, D. C. 21510

Dear Mr. Chairman:

During my recent appearance before your Committee on the intelligence community's FY 1976 budget request, you asked that I provide my views on public disclosure of certain parts of the intelligence budget.

I am strongly opposed to the public disclosure of the Central Intelligence Agency's budget or of a total budget figure for the intelligence community. While I recognize that, in the final analysis, this is a matter for determination by the Congress, I believe disclosure would do a disservice to our foreign intelligence efforts and therefore would not be in the national interest.

I am convinced that once an intelligence budget figure is made public, it will be impossible to prevent the disclosure of many sensitive and critically important intelligence programs and activities. Whether the published figure represents the Agency or intelligence community budget, whether it reveals intelligence budgets in whole or in part, I believe the ultimate effect would be the same.

Disclosure of intelligence budgets could provide potential adversaries with significant insight into the nature and scope of our national foreign intelligence effort, particularly where analysis of year-to-year fluctuations in the budget are possible. Publication of part of the intelligence budget would raise debate over what matters were included and what matters were not included in the published totals, leading to rapid erosion of the secrecy of the portions withheld.

COMPT RECORD COPY

The same problems would result from the publication of the total Agency budget as would result from publication of the total figure covering "intelligence". An immediate requirement would be levied to explain precisely which of our intelligence activities were covered by the figure and which were not. Definitional questions over where "intelligence" expenditures stop and operational expenditures begin would necessarily lead to public discussion of sensitive intelligence programs and techniques.

Publication of intelligence budget figures would result in debate on changes or trends developed in succeeding year figures, and fluctuations in the figure would generate demands for explanations which in turn would reveal the component parts of the figure and the programs supported by it. The history of disclosure of Atomic Energy Commission budget materials and related information by both the Executive Branch and the Congress indicates that publication of any figure with respect to intelligence would quickly stimulate pressures for further disclosure and probes by various sectors into the nature of the figure and its component elements.

Attacks have been made on the constitutionality of the present financial processes for protecting our national foreign intelligence effort. I believe the present procedures are fully in accord with the Constitution. Moneys for all intelligence community activities are an integral part of appropriations made by law and are reflected in the Treasury's Statement and Account of Receipts and Expenditures in compliance with Article I, Section 9, clause 7 of the Constitution. Moreover, there is considerable historical precedent for budgetary secrecy, going back to debates in Constitutional Conventions and the use of a secret fund during the administrations of Washington and Madison, and a secret appropriations act in 1811. Congress most recently endorsed secrecy of intelligence budgets in June 1974 when the Senate rejected an amendment to the Department of Defense Appropriations Act of 1975 which would have required that the total budget figure for intelligence purposes be made public.

Sincerely,

/s/ W. E. Colby

W. E. Colby

On Fund Secrecy

By George Lardner Jr.
Washington Post Staff Writer

Central Intelligence Agency Director William E. Colby said yesterday that he remains opposed to any inroads on the secrecy surrounding the spy agency's multi-million-dollar budget.

Indicating his disagreement with one of the key recommendations of the Rockefeller commission, Colby maintained that making public even the CIA's overall spending would inevitably lead to disclosure of some of its secret activities.

"There are certain things, of course, in our clandestine activity that must be kept from public exposure and even the risk of public exposure," Colby said in an interview on the television program, "Meet the Press" (NBC, WRC).

In its report earlier this month, the Rockefeller commission recommended that Congress carefully consider making the CIA budget public "at least to some extent." The commission suggested that this ought to be done in light of the Constitution's requirement that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The CIA budget, which reportedly totals some $750 million a year, has been hidden in recent years in the Defense Department's appropriations bill.

To illustrate the slippage he feared, Colby said that in 1947 the Atomic Energy Commission's weapons expenditures were made public as only a "one-line item," but last year consisted of 15 pages of detailed explanation.

"I think it is inevitable that if you expose the single figure, you will immediately get a debate as to what it includes, what it does not include, why did it go up, why did it go down, and you will very shortly get into a description of the details of our activities," Colby said.

Touching on other issues raised by the current investigation of the CIA and other intelligence agencies, Colby:

• Refused to say whether the even larger National Security Agency regularly monitors telephone calls between

Week Start - 30(Jan 74

Colby Opposes Disclosure Of Any CIA Budget Figures

COLBY, From A1

Americans and citizens in foreign countries. The CIA director would say only that the NSA's work includes "the following of foreign communications."

• Said that the Forty Committee, an arm of the National Security Council which is supposed to review high-risk covert operations abroad, meets only infrequently because "that activity has dwindled to almost nothing" in recent years and constitutes "a very small percentage of our budget at the moment."

• Said that many of the details concerning the CIA's involvement in assassination plots were "not well recorded" and indicated it may be impossible to determine whether the CIA was acting on its own in such undertakings or whether presidential approval was obtained. He said CIA policy is clearly opposed to assassination efforts "at this time" and contended it would not be "useful to our country to go into a great exposure of things that happened in the '50s and the '60s."

WILLIAM E. COLBY
... fears slippage

• Declared that he "thought it best to let the misdeeds of the past sit quietly" in 1973 when the CIA's inspector general compiled a report detailing various illegal and improper activities and said he did not see "anything serious enough in there to warrant prosecution against any individual."

Colby told The Washington Post in an earlier interview that in retrospect, he now feels he should have reported the activities to the Justice Department.

He categorically denied rumors that the CIA might somehow be involved in attempts to oust Indira Gandhi as prime minister of India.

25 JUN 1975

Honorable George H. Mahon, Chairman
Subcommittee on Defense
Committee on Appropriations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I understand the Committee is considering the possibility of providing some form of open appropriation for the Central Intelligence Agency.

I am strongly opposed to the public disclosure of the Central Intelligence Agency's budget or of a total budget figure for the intelligence community. While I recognize that, in the final analysis, this is a matter for determination by the Congress, I believe disclosure would do a disservice to our foreign intelligence efforts and therefore would not be in the national interest.

I am convinced that once an intelligence budget figure is made public, it will be impossible to prevent the disclosure of many sensitive and critically important intelligence programs and activities. Whether the published figure represents the Agency or intelligence community budget, whether it reveals intelligence budgets in whole or in part, I believe the ultimate effect would be the same.

Disclosure of intelligence budgets could provide potential adversaries with significant insight into the nature and scope of our national foreign intelligence effort, particularly where analysis of year-to-year fluctuations in the budget are possible. Publication of part of the intelligence budget would raise debate over what matters were included and what matters were not included in the published totals, leading to rapid erosion of the secrecy of the portions withheld. The same problems would result from the publication of the total Agency budget, a total Community budget, or any other figure covering "intelligence." An immediate requirement would be levied to explain precisely which of our intelligence activities were covered by the figure and which were not. Definitional questions over where "intelligence" expenditures stop and operational expenditures begin would necessarily lead to public discussion of sensitive intelligence programs and techniques.

Publication of intelligence budget figures would result in debate on changes or trends developed in succeeding year figures, and fluctuations in the figure would generate demands for explanations which in turn would reveal the component parts of the figure and the programs supported by it. The history of disclosure of Atomic Energy Commission budget materials and related information by both the Executive Branch and the Congress indicates that publication of any figure with respect to intelligence would quickly stimulate pressures for further disclosure and probes by various sectors into the nature of the figure and its component elements.

Attacks have been made on the constitutionality of the present financial processes for protecting our national foreign intelligence effort. I believe the present procedures are fully in accord with the Constitution. Agency appropriations are an integral part of appropriations made by law and are reflected in the Treasury's Statement and Account of Receipts and Expenditures in compliance with Article I, Section 9, clause 7 of the Constitution. Moreover, there is considerable historical precedent for budgetary secrecy, going back to debates in Constitutional Conventions and the use of a secret fund during the administrations of Washington and Madison, and a secret appropriations act in 1811. Congress most recently endorsed secrecy of intelligence budgets in June 1974 when the Senate rejected an amendment to the Department of Defense Appropriations Act of 1975 which would have required that the total budget figure for intelligence purposes be made public.

Sincerely,

SIGNED
W. E. Colby
Director

CEI RAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

22 FEB 1974

Honorable John L. McClellan
Chairman, Committee on Appropriations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

In your letter of 5 February 1974 you asked for my views on proposals made by Senator William Proxmire in a letter to you dated 30 January 1974 that the Intelligence Operations Subcommittee release an aggregate figure broken down by agency which indicates the total amount spent on intelligence by the U.S. yearly.

Senator Proxmire goes on to say he agrees that the release of manpower statistics and budgetary information that indicates the relative priorities of the intelligence community cannot be permitted. His basic purpose is to show to the American public the rough apportionment of intelligence dollars to defense and civilian agencies while fully protecting intelligence programs.

You will recall that on 27 July 1973 I responded to a similar request from you regarding the disclosure of the budget figures for the National Intelligence Program which I presented to the Subcommittee on 11 July 1973. I believe the considerations which I outlined in that letter still apply. I stated my view that disclosure of the total figure would not in and of itself present a security problem. I want on to explain, however, that I felt it would establish a precedent for the disclosure of this figure annually. If this were to occur, the annual fluctuations in our total intelligence effort would be revealed and it would not be in the national interest to disclose that kind of information to foreign nations.

I pointed out that such disclosure of total figures for all programs would reveal considerable information about the distribution of our intelligence resources among different types of intelligence activity and an annual update of those figures would provide insights into the changes and trends in our intelligence programs which could be damaging to intelligence sources and methods.

I am still concerned that public disclosure of total intelligence figures on an annual basis would lead to pressures for further public explanation of the programs for which the monies were appropriated. In my judgment this is the very kind of information which Senator Proxmire has indicated in his letter to you should not be released.

I feel that the final determination of how information on these funds should be handled within the Congress is a matter for the Congress to decide. I feel quite strongly, however, that because of the responsibility placed upon me by the Congress in the National Security Act of 1947 for the protection of intelligence sources and methods, I could not authorize the release of the figures which Senator Proxmire has proposed.

Sincerely,

SIGNED

W. E. Colby
Director

gence coverage of the Viercong infrastructure and these questions are ones which I shared and at the same time tried to resolve.

Question. How relevant are the contents of the [deleted] cables to the situation in 1973?

Answer. I think there are a number of intelligence indicators that VCI strength in 1973 is considerably less than it was in 1970, both in terms of numbers and, particularly, in terms of effectiveness and capability. There are several factors present in 1973 which were not present in 1970: Since the January 1973 Paris Agreements, North Vietnam has infiltrated ethnic North Vietnamese administrative and political personnel to perform VCI functions that would certainly be performed by ethnic southerners if the latter were available. Furthermore, the North Vietnamese have had to dispatch northerners to perform these local functions despite the release of substantial numbers of civilian prisoners (former VCI) held by the GVN, who would presumably be available to resume their VCI activities on the other side. In 1973, there is of course a much higher degree of GVN presence, security and effective administrative control in the countryside than there was in 1970. This may well reduce the incentives to participate in the VCI, even for Communist sympathizers. Factors such as these, I believe, make the July 1973 situation appreciably different from that of June 1970.

Question. Paragraph [deleted] of the [deleted] 1970 cable states, in part: [deleted] In light of the developments since 1970, the massive disruptions of 1972, the ceasefire agreement of 1973, and the current situation in South Vietnam, comment on this statement.

Answer. I believe the strength and effectiveness of the VCI has been substantially reduced since 1970. I would prefer not to set a statistical level. The VCI and the North Vietnamese are infiltrating some additional strength, as noted above, but there is no indication at this time that the VCI has gained strength or effectiveness since January 1973.

Question. Define the objectives of the Phoenix Program. With appropriate documentation, what is your understanding of the degree of success or failure in accomplishing these objectives?

Answer. The Phoenix program was designed to bring order and effectiveness to the government, if not the Communist, side of the struggle between the VCI and the people and government of South Vietnam. I believe it made a substantial but not necessarily decisive contribution to the government's ability to resist the attempt to overthrow it and the massive military assault in 1972.

PREPARED QUESTIONS FROM SENATOR HUGHES

[Questions submitted by Senator Hughes. Answers supplied by Mr. Colby.]

Question. Can you tell us publicly the budget totals for the CIA and for the rest of the intelligence community? If not, how are we to judge whether these amounts are appropriate in view of the intelligence product and the competing claims for government resources?

Answer. The budget totals for the Central Intelligence Agency and the members of the intelligence community have traditionally been maintained on a classified basis and revealed only in executive session. I defer to the appropriate congressional authorities for any change in this procedure. Budget requests are reviewed in detail in the Agency's annual budget hearings with the Appropriations Committees of the Senate and the House of Representatives.

Question. In order for the responsible committees of Congress to do their work on national security matters in a better informed way, would you accept legislation requiring the CIA to furnish these committees regular and special reports on matters within their purview, subject of course to proper security measures? Would this not be a valuable addition to the infrequent and wide-ranging briefings now given the Committee?

Answer. The Director of Central Intelligence traditionally has given briefings on the world situation and on specific topics to a number of Senate and House committees. I will review the matter and report to the Armed Services Committee on the possibility of supplementing such briefings by appropriate written materials, provided these can be maintained on a classified basis. I think this can be accomplished without legislation.

Question. What steps have been taken or will you take to ensure that the CIA never again will be involved in domestic American activities, as it was in the training of police personnel from several U.S. cities and in the assistance to Howard Hunt and Gordon Liddy?

Answer. A careful review has been made of all possible Agency involvement in domestic American activities, and instructions are being issued to ensure that no violation of the limitations of CIA's statutory authority takes place in the future. With respect to the training of local police personnel, I reiterate Dr. Schlesinger's assurance that, despite the fact that its legality might be defended, any further such action will be taken only in the most exceptional circumstanees and with the Director's personal approval. Regulations are being developed with respect to CIA assistance to other U.S. agencies and personnel to ensure that any such assistance raises no question of CIA involvement in domestic American activities.

Question. Mr. Colby, published reports say that your experience has been in the plans and operations side of the CIA rather than in intelligence or science and technology. Because of the availability of new technical intelligence gathering means, not to mention the backlash and suspicion in many areas of the world regarding agents, do you believe that the time has come to reduce some of our overseas operations in order to put greater stress on intelligence analysis and science and technology?

Answer. Over the past fifteen years great stress has been placed on scientific and technological intelligence gathering, which has made a great contribution to accurate knowledge of important foreign developments. Overseas intelligence operations must only be conducted in circumstances fully justifying the risks involved and in situations which cannot be covered by more normal methods. Analysis has made a substantial contribution to intelligence and is being improved and refined to the greatest degree possible.

Question. Published reports also give you a key policy role in decisions to involve the United States in clandestine operations in Laos in the late 1950s and early 1960s—operations which grew into a secret, CIA-run war.

On reflection, do you believe that it was wise for the Agency to get involved in such military operations?

Answer. The Agency's activities in Laos were undertaken in direct response to Presidential and National Security Council direction in order to carry out U.S. policy and at the same time avoid the necessity for uniformed U.S. involvement in Laos. These activities grew in size over the years to meet greater North Vietnamese and Pathet Lao pressure. The size to which these operations grew made it difficult to maintain normal intelligence procedures. Despite the difficulties for CIA, I submit that the Agency fulfilled the charge given it efficiently and effectively.

Question. Do you believe that it is proper under our Constitution for such military operations to be conducted without the knowledge or approval of the Congress?

Answer. The appropriate committees of the Congress and a number of individual senators and congressmen were briefed on CIA's activities in Laos during the period covered. In addition, CIA's programs were described to the Appropriations Committees in our annual budget hearings.

Question. Where should the line be drawn between CIA and Defense Department activities involving the use of armed force?

Answer. In general, the line should be drawn between CIA and the Defense Department with respect to armed force at the point in which the United States acknowledges involvement in such activities. As a practical matter, however, the scale of the activity will, in many cases, also affect whether the United States is revealed as engaged in the activity.

Question. Where do you—and should we—draw the line between simply gathering intelligence and manipulating events or interfering in the internal affairs of other countries? In particular, why should the CIA play any role in nations of the underdeveloped world which pose no conceivable threat to us?

Answer. As indicated above, the use of intelligence techniques should be reserved to cases of importance in which no other means will serve. This same

approach is even more stringently applied to any activity which could be construed as interfering in the internal affairs of other nations, and such activities are only conducted under the specific direction of the National Security Council. With this approach, it would be unlikely that CIA would play a role of this nature in any nation whose policies pose no conceivable threat to United States interests.

PREPARED QUESTIONS FROM SENATOR PROXMIRE

[Questions submitted by Senator Proxmire. Answers supplied by Mr. Colby.]

Question. Given your previous testimony that it is up to Congress to decide to release the intelligence community budget, please indicate the degree to which this information can be prudently broken down. By Directorate? By Office? By function?

Answer. This question is an excellent example of the problem raised by the release of intelligence budget figures. While I believe that disclosure of the total figure of the intelligence community budget would not present a security problem at this time, it is likely to stimulate requests for additional detail. There is a danger to national security in the release or leakage of such detail; there is also a potential danger to national security in the revelation of trends of different details of the budget over several years even though any one year's figures would not present a major problem. For example, a substantial decline or increase in the funds provided to any one intelligence system would be a clear indicator of a change of emphasis on that system, which could alert possible targets of such a system. Thus, I rely upon Congress to make the determination, but I cannot positively recommend the publication of the total or any subdivision thereof. The information requested is of course fully available on a classified basis to the appropriate subcommittees of the Appropriations and Armed Services Committees upon request.

Question. Is there any national security reason why the manpower statistics for the CIA and other intelligence components cannot be released publicly?

Answer. The same considerations discussed above for the budget figures apply to manpower figures. For example, the allocation of manpower among programs would immediately reveal a high degree of emphasis on one particular collection technique and could only alert other powers to need to protect themselves against that.

Question. Have you provided the committee with an indication where the intelligence budget is hidden in the federal budget? If not, why not?

Answer. The location of the intelligence budget is fully known to the Chairman and members of the Appropriations Subcommittee dealing with intelligence. To the extent desired, it has been and could be made available to members of the subcommittees of the Armed Services Committees on request. The appropriations arrangements are in accordance with the wishes of the Appropriations Committees.

Question. What is the proportional allocation of the CIA budget by directorate?

Answer. By function, the 1974 CIA budget is allocated as follows: [deleted] of the total budget is devoted to collection activities: [deleted] is devoted to production activities; [deleted] is devoted to special operations; and [deleted] is devoted to support, including the operation of the [deleted].

The Agency's budget is allocated among its four directorates as follows: The Directorate for [deleted]; the Directorate for [deleted]; the Directorate for [deleted] and [deleted]; and the Directorate for [deleted] and [deleted]. The remaining [deleted] is allocated to the DCI Area.

Question. How has this (proportion allocated to each function or directorate) changed in the last ten years?

Answer. In functional terms, collected of intelligence consumed [deleted] of the CIA budget in 1964; today it is [deleted]. Production accounted for [deleted] of the Agency's total in 1964; today it is [deleted]. Special operations used [deleted] of the Agency's resources in 1964; today that percentage is [deleted]. Support in 1964 used [deleted]; today it is [deleted].

In organizational terms, the DCI Area [deleted] from [deleted] to [deleted] of the Agency's total during the period 1964 to 1974; the [deleted] Directorate [deleted] from [deleted] to [deleted]; the [deleted] Directorate [deleted] from [deleted] to [deleted] during the same period; the [deleted] and [deleted] Directorate [deleted] from [deleted] to [deleted]; and the Directorate for [deleted] and [deleted] has [deleted] from [deleted] in 1964 to [deleted] today.

These figures are general because there have been a number of organizational changes within the Agency over this 10-year period which affect the comparability of these figures, especially with respect to the directorates. The above figures are considered quite sensitive for the reasons outlined in the answer to question 1, i.e., the ability to deduce the major thrust of our intelligence effort. For this reason, these are held on a most restricted basis even within the Agency.

Question. Who audits the CIA budget? With what frequency?

Answer. The CIA budget is reviewed by the Office of Management and Budget in detail prior to inclusion in the President's recommended overall budget to Congress. With respect to auditing CIA expenditures, there is an audit staff within CIA reporting to the Director through the Inspector General, which audits all Agency accounts. In most cases this is done on an annual basis although some of the small accounts are audited on a less frequent basis. In some situations outside audit firms are used or the Defense Contract Audit Agency is used on accounts where this is appropriatae. In addition, there is an industrial contract audit staff to audit many of the Agency's contracts with industry. In certain larger accounts a resident auditor conducts continuing audits.

Question. What economies have been instituted in the last five years? At what savings?

Answer. By far the most significant economies and savings that have been instituted in the past five years flow from the overall reductions in personnel which have been carried out by the Agency. From a 1967 total of [deleted] positions, the Agency has been reduced to a 1974 budget level of [deleted] positions with still further reductions to [deleted] as a result of decisions made after the budget request was determined in December. The total reduction over the period 1967 to 1974 is [deleted] positions, or [deleted].

Our budget today would be [deleted] higher if these personnel reductions had not been taken. Cumulative savings resulting from these personnel reductions total [deleted] over the period 1967 to 1974.

There have been numerous other reductions and savings the Agency has absorbed significant cost increases overseas and in the U.S. in recent years. Since 1967, the Agency budget has fluctuated between [deleted] and [deleted]. Our pending Congressional resquest is [deleted]. During this same period, the percentage of our budget devoted to personal services has increased from [deleted] even while total personnel levels have been declining. This has meant a significant reduction in funds available for other than personnel, and it indicates the extent to which we have been forced to reduce and consolidate our activities.

Question. Given the fact that many thousands of employees at CIA and other intelligence agencies have been shown the National Security Council Intelligence Directives as part of their indoctrination/familiarization process, why have not these NSCIDs become a part of prior Congressional briefings?

Answer. National Security Council Directive, as are all sensitive Intelligence documents, are made available only to employees with a "need to know." Many employees are aware of NSCIDs and the general nature of them but do not see them directly. While the NSCIDs are not Agency documents, I have been authorized to show them to the subcommittees on a classified basis.

Question. What authority does the National Security Council have to interpret and extend the National Security Act of 1947 without the approval of Congress?

Answer. The National Security Act of 1947 provides that the National Security Council shall issue directives pursuant to the Act.

Question. What is the CIA's official position on the bill S. 1935?

Answer. CIA's position on this bill will be made available to Congress upon appropriate clearance by the Office of Management and Budget for the President.

Colby Confirmation hearing July 1973

We have determined that quite a substantial number of individuals were excess to our needs and our total strength has dropped in the neighborhood of 7 or 8 percent, I think, in the past 4 months. As to the future, as I indicated, the problem of the cost of personnel and the cost of operations now are going to require, I believe, some additional pruning of activities that may not be able to stand the competitive situation for resources that we have and, consequently, it is possible that other reductions will ensue.

Senator SYMINGTON. You will continue this program of involuntary retirements, particularly CIA personnel with overseas assignments?

Mr. COLBY. I do intend to continue a program of identifying the individuals who stand lowest on the scale of performance among their fellows and arranging a situation where they can be helped to leave Government service early rather than having them wait around too long.

Senator SYMINGTON. Several Members of Congress have called for the overall budget of the intelligence community to be made public, so the American people can see at least the general amount which is spent for intelligence functions. In past years, and despite the increasing desire of the American people to know what is going on in their Government, the furnishing of intelligence information has been further restricted.

Do you see any reason why overall budget information, or even a breakdown of the intelligence budget into its major categories, would endanger national security if it were made public?

Mr. COLBY. I would propose to leave that question, Mr. Chairman, in the hands of the Congress to decide. I think there are considerations pro and con on all sides of that question. But I have found that the Congress is at least as responsible on this as our friends elsewhere in Government, and we have, as you know, shared with the Congress some very sensitive material which has been successfully protected by the Congress.

On the other hand, there are situations in which an American intelligence service will have to be much more exposed than the intelligence services of other countries. We are not going to run the kind of intelligence service that other countries run. We are going to run one in the American society and the American constitutional structure, and I can see that there may be a requirement to expose to the American people a great deal more than might be convenient from the narrow intelligence point of view.

Senator SYMINGTON. What would be your views regarding the requirement for an annual authorization of the budget of the intelligence community prior to appropriation, as is required for a portion of the Department of Defense budget?

Mr. COLBY. That would be up to the Congress again, Mr. Chairman. I think that in that circumstance we would explain our plans to the appropriate oversight committees in the same way we do to the appropriations committees. We would give a full description of what we have in mind to do.

Senator SYMINGTON. I do not want to belabor this. After some years on the Foreign Relations Committee and the Armed Services Committee, where I have been a member of the CIA Subcommittee, I came to realize that many concepts of policy were being made by foreign relations without accurate information. Under the so-called Kennedy let-

NOMINATION OF JAMES R. SCHLESINGER, TO BE SECRETARY OF DEFENSE

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

NOMINATION OF JAMES R. SCHLESINGER, TO BE SECRETARY OF DEFENSE

JUNE 18, 1973

Printed for the use of the Committee on Armed Services

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Dr. SCHLESINGER. I think that in the past, perhaps, for a variety of reasons, reflecting the psychology of the country at that time that there may have been a tendency to overclassify within the Department of Defense and within some other components of Government.

That is my response.

May I add to that the word that I would intend to avoid or reduce excessive classification during my tenure, if that is achievable. I think we can reduce some of the propensities to overclassify.

Senator BYRD. I think that would be very desirable. I think that there is, I understand, the tendency, there is a certain tendency, great tendency to greatly overclassify.

Senator SYMINGTON. Would the Senator yield?

Senator BYRD. Yes.

Senator SYMINGTON. I thank you. I have a friend from Virginia.

The questions that you supply for the record, this is an open hearing. We would like to have the record on the Floor when your confirmation comes up and I know that the Pentagon will only be too glad to cooperate with you to get the record out at the earliest possible time. So we would appreciate it if you would do that.

Dr. SCHLESINGER. Yes, sir, indeed. This is not a time I would encourage delays in response. [Laughter.]

Senator SYMINGTON. Thank you.

Senator BYRD. I am glad to notice your statement that you will claim attempt to do something in regard to the overclassification. I think that will be very helpful all down the line. I may tend to go in the opposite direction. I am too objective, being a newspaper editor most of my life, but, I think that the Defense Department has gone too far in the classification direction.

When you were before the committee for confirmation as Director of the Central Intelligence Agency, I raised a point as to whether it might not be appropriate without damaging our intelligence activities, to make available to the public the total amount of funds being appropriated to the CIA with major breakdowns but not detailed breakdowns. I think there is a need for classification as to how certain funds are used but I have not been able to establish in my own mind the need to say that x numbers of dollars, you cannot say that x numbers of dollars is being spent for the CIA. You have had an opportunity to look at that from the point of view of the CIA. You are going into the Defense Department which is involved in this also because it adds to the defense budget. I am wondering if you would comment on that this morning.

Dr. SCHLESINGER. I think that it might be an acceptable procedure, Senator, to indicate the total figure of the national intelligence programs. I would not personally advocate it but it may be an acceptable procedure. I think, as you well know, that this has been discussed not only with the Armed Services Committees in the two Houses but also with the Appropriation Committees. There is the feeling that it might be wise to give the gross figure. I have come to share that feeling at least in this time frame but that does not say that it is not a possibility.

Senator BYRD. You are not strongly opposed to that, I take it?

Dr. SCHLESINGER. I would say that that is something that could be done on balance. I would lean against it. But I think that it could be

done. The problem that you get into, you see, as you well know, Senator, is that it would be just a free floating figure, unsupported and unsupportable in public, with nobody except the members of the Oversight Committees or members of the Armed Services Committee and Appropriation Committees who would know the details. Those are circumstances which under certain conditions would elicit the strong tendency for a flat 10 percent, 20 percent, 50 percent, 100 percent, cut in intelligence activities because there is an identifiable target with no broad understanding of what the components are and it is that aspect that I think concerns me.

Senator BYRD. There would be no security reasons why it should not be done.

Dr. SCHLESINGER. For the gross figure I think that the security concerns are minimal. The component figures I would be more concerned about but for the gross national intelligence program figures I think we could live with that on a security basis, yes.

Senator BYRD. Dr. Schlesinger, if you are confirmed as Secretary of Defense will you provide to the appropriate committees all information and data that the committees deem necessary to adequately evaluate the requirements and utilization of tax funds?

Dr. SCHLESINGER. I think the answer to that is generally yes.

Senator BYRD. I thought it would be well to have it on the record.

Just one additional question.

The Senate last year passed legislation, and I assume it will do so again this year, specifying that if U.S. troops are used they can only be used without the consent of Congress for a specified period of time.

At the end of that time, at the end of the beginning of the emergency, the Congress would have to give approval. In principal, would you favor or oppose that legislation?

Dr. SCHLESINGER. I think, Senator, although I have not studied it carefully, I would oppose that legislation. The reason for that is it is very difficult to put this into a specific time frame and an arbitrary, single procedure may well not serve the country satisfactorily.

I would say this: That at the present time the Congress if it wishes, can pass legislation to forestall any activities almost immediately. It doesn't have to wait for months. So that there is within the present system the opportunity for Congress to exercise its powers without setting a specific time period. I think that there is concern about the war powers but I think that this particular legislation on balance, to the extent that I understand it, would not tend to serve a fruitful purpose. But I underscore the fact that I have not looked very deeply into that, and my opinion might be different in 3 weeks' time if I were to study it carefully.

Senator BYRD. Thank you.

Thank you, Mr. Chairman.

Senator SYMINGTON. Thank you, Senator.

Dr. Schlesinger, I ask this question for Senator Cannon, who is chairman of the Subcommittee on the Tactical Air Committee that meets tomorrow.

Did you participate or support Secretary Clements' decision on the F-14 that will be discussed before the subcommittee tomorrow?

Dr. SCHLESINGER. I did not participate in that decision save to the extent that Secretary Clements discussed the decision with me.

TRANSMITTAL SLIP | DATE 2 SEP 1975

TO: DCI

ROOM NO. | BUILDING

REMARKS:

STAT

FROM: OLC

ROOM NO. 6C19 | BUILDING Hq.

STAT

FORM NO. 241 1 FEB 55 REPLACES FORM 36-8 WHICH MAY BE USED. (47)

EP 75-7095/1

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Executive Registry
75-7095/1

OLC 75-2011/a

29 AUG 1975

Morton H. Halperin, Esq.
122 Maryland Avenue, N.E.
Washington, D.C. 20002

Dear Mr. Halperin:

We have studied your letter of 13 May 1975, in which you request a waiver of fees in connection with your 19 February 1975 request for Attachment A documents (44 itemized descriptions of documents).

In your letter you make two major points. First, you profess amazement that any search is necessary since "the documents requested all relate to domestic activities of the Central Intelligence Agency..." and "it (is) difficult to believe that in light of the intense presidential, congressional, and public interest in the CIA's domestic activities that the CIA awaited my request before searching for the very files identified by the Director as constituting the files of the domestic activities of the CIA." Second, you argue that any search fee should be waived because "(i)t is difficult for me to conceive of a set of documents whose release would more clearly benefit the general public."

Pursuant to your second point, we have considered the criteria which the Attorney General's memorandum on the 1974 Amendments to the Freedom of Information Act suggests should be used in deciding whether to exercise administrative discretion to waive the fee. These criteria include "the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, the likelihood that tangible public good will be realized, and other factors which may be pertinent...." (p. 15)

It may well be that as a general rule the type of request which you have submitted would fall within the rubric of those requests which would benefit the general public and contribute to public debate on an important policy issue. If your request was of this Agency at another time, or of another government agency at this time, we could substantially agree with the arguments which you press upon us. Your request that the search fee be waived comes, however, at a time when the

(EXECUTIVE REGISTRY FILE I-6-7)

report of the Commission on CIA Activities Within the United States has been released to the public, when the DCI's report to the President also has been released to the public, and when a full-scale legislative investigation is underway. It is in such a context that we have examined the results of the search thus far. In our view, what could be released raises no new issues and offers little likelihood that tangible public good will be realized.

In our examination of your request for waiver of fees we have been mindful of the spirit of the Freedom of Information Act and of your argument that fees should be waived when the purpose of the information is to contribute to the "uninhibited, robust and wide-open debate on public issues." This Agency is not seeking to inhibit debate on public issues, but we are at pains to understand how anything which we could provide now would make public debate on CIA domestic activities more "robust" than it is at present. Moreover, it might be persuasively argued that premature public disclosure of information at a time when a thoroughgoing congressional investigation was underway would not be in the public interest and, in fact, might operate to the public detriment.

The Freedom of Information Act does not permit charging for other than search costs but we cannot ignore the fact that substantial additional costs are incurred. Responding to the 44 itemized categories which you are seeking has placed a heavy burden on this Agency and has occupied the energies of administrative, clerical, legal, and substantive personnel.

To date, on search alone, 120 1/2 man-hours have been expended at a cost of $964.00. The future cost rate of $640.00 per week given to you would involve a present commitment of two full-time professionals working exclusively on your requests under priorities as you and the Agency would negotiate. The full scope of your requests, however, would involve a total estimated manpower in excess of 100 professionals and several months of work. This involves only search time and effort and does not include the time and effort for review.

In considering whether the search costs must be borne by you or by the taxpayer, we have also weighed the public benefit to be served by the material sought against the public interest to be served by using funds appropriated by Congress for intelligence collection and analysis for that purpose. In view of the type of material already at the disposal of the public, we cannot in good conscience add the cost of the search to the bill already being paid by the taxpayer to respond to your request.

With regard to your doubts about the search itself, I should like to take this opportunity to assure you that a very time-consuming search was instituted in response to your Freedom of Information request. We regret that resolution of the fee waiver matter has taken so long, and we recognize the considerable financial burden our fee estimate could represent for you. We will review the $964.00 charged for the search to date to make certain that any overlap between your request and searches done for Executive and Legislative Branch investigations is resolved in your favor and that you are not charged for items which were collected for another purpose.

Sincerely,

SIGNED

Gene F. Wilson
Freedom of Information Coordinator

Distribution:
Orig. - Addressee
1 - DCI
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1 - OLC/Chrono

25X1 OLC/PLC/dlw [redacted] (27 Aug. 1975)

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

OLC 75-1473/a

28 AUG 1975

Honorable Edward M. Kennedy, Chairman
Subcommittee on Administrative
Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your recent letter on behalf of Mr. Morton H. Halperin regarding his request that fees be waived in connection with his request for documents relating to the domestic activities of the CIA.

We recognize the spirit behind the Freedom of Information Act and have given careful consideration to the arguments which Mr. Halperin has advanced. Mr. Halperin has levied on this Agency a burdensome request. We have devoted a significant number of man-days and a significant amount of money in response to this request. The search costs which we have charged do not begin to reflect the effort or the costs which are involved in reviewing the voluminous material he requested and deciding on its releasability. The $964.00 charged him in our letter of 8 May 1975 was only for search performed up to 28 April, which involved 120 1/2 man-hours.

Mr. Halperin urges that the search for the documents he requests has already been undertaken pursuant to the Agency's response to the Commission on CIA Activities Within the United States. To some degree this is of course true, and a large amount of material was selected and delivered to that Commission. The phrasing of Mr. Halperin's request, however, requires additional search to make sure that it does not include additional material which was perhaps examined by the Commission's investigators but not selected for forwarding to the Commission. The $640.00 per week future cost rate given to

Mr. Halperin is based on a commitment of two full-time professionals. To complete the task as broadly stated by Mr. Halperin would require, in our estimate, the full time of over 100 professionals and several months of work. This would involve only the search time and effort and would not include the time and effort for review by the senior officials who would have to examine much of this sensitive material. Clearly this would be a major effort for the Agency.

In determining whether these search costs should be borne by the taxpayer or by Mr. Halperin personally, we have examined the likelihood of tangible public good resulting from Mr. Halperin's Freedom of Information request. In this context, we believe the report of the Commission on CIA Activities Within the United States has publicized the essence of the material covered by Mr. Halperin's request. The public good which has resulted from this report would not seem to be increased by the degree of detail requested by Mr. Halperin. Before any decision can be made as to the releasability of the material which was the basis of the Commission's report, it would have to be re-examined in detail to delete intelligence sources and methods, properly classified material and matters involving citizens' privacy.

Apart from the work of the President's Commission, of course, Senate and House Select Committees are both now investigating the Agency. Again, these are investigating not only unclassified material, but classified material. They will certainly cover the material requested by Mr. Halperin, although they will review much of it in classified form. I believe that the public good which can come from a full review of CIA's activities again is more apt to come from such a review of our classified material than from a declassification of it to the extent possible under the Freedom of Information Act at this time. I recognize Mr. Halperin's reference to the spirit of the Freedom of Information Act that fees should be waived when the disclosure would contribute to the "uninhibited, robust and wide-open debate on public issues." I confess being at some pains to understand how our public debate on CIA's activities could be more "robust" than it is and has been for the past several months. In fact, premature disclosure of detailed information might operate to the detriment of a thoroughgoing and sober review by the appropriate committees of the proper performance of CIA.

For this reason, I have concluded that it is not feasible to comply with Mr. Halperin's request that we waive the fees involved in his Freedom of Information request. I believe that our first responsibility is to respond to the Select Committees now reviewing the Agency's activities and to continue the important substantive work of this Agency. I believe Mr. Halperin's purpose may in truth be served better by their final conclusions and the degree they feel it appropriate to release this material.

Sincerely,

SIGNED

Vernon A. Walters
Acting Director

Distribution:
Orig. - Addressee
1 - DCI
1 - DDCI
1 - ER
1 - OGC
1 - DDA
1 - A/I/DDA
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1 - OLC/Subj.
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25X1

OLC/PLC/dlw [redacted] (27 Aug. 1975)

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EXECUTIVE SECRETARIAT

Routing Slip

TO:		ACTION	INFO	DATE	INITIAL
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3	S/MC				
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5	DDI				
6	DDA		X		
7	DDO				
8	D/DCI/IC				
9	D/DCI/NIO				
10	GC		X		
11	LC	X			
12	IG				
13	Compt				
14	D/Pers				
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16	DTR				
17	Asst/DCI				
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19	C/IRS		X		
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22					
	SUSPENSE	7 July			
		Date			

Remarks:

Please draft reply for signature of DCI who has not seen.

[redacted]

06/30/75

Date

3637 (1-75)

25X1

OLC 75-1473

United States Senate

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
(PURSUANT TO SEC. 3, S. RES. 35, 83D CONGRESS)
WASHINGTON, D.C. 20510

Kennedy

June 27, 1975

Mr. William E. Colby
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Colby:

The Subcommittee on Administrative Practice and Procedure has received a copy of the correspondence between your agency and Mr. Morton H. Halperin regarding the question of fees to be charged in connection with his request for various documents relating to the domestic activities of the Central Intelligence Agency.

As I understand the situation, Mr. Halperin has requested a number of documents and files referred to in your testimony before the Senate Appropriations Committee. After some discussion, your staff and Mr. Halperin entered into an agreement on how the request would be handled. The question of fees and Mr. Halperin's request for a waiver of fees was left open.

Subsequently Mr. Young of your staff wrote to Mr. Halperin stating that his request for a waiver of fees had been denied, indicating that chargeable fees had reached $964 and that further handling of the request would incur costs at a rate of $640 per week. Mr. Halperin then wrote to your staff specifying at length why fees should be waived in connection with this request.

I have read Mr. Halperin's letter and believe that the case he presents is persuasive. As you know, the subject of CIA domestic activity is a matter of the most intense public interest. While the Freedom of Information Act Amendments left the waiver of fees to the discretion of agency heads, Congress clearly intended that fees be waived when the release of the information would primarily benefit the public. The release of information about CIA domestic activities, which can be made available without damage to our intelligence activities, would of course be of great public value. Mr. Halperin, as I understand, is not requesting this information for private or commercial use but for general distribution and dissemination.

Congress left the matter of fees to agency discretion with the clear understanding that fee charges would not be used to prevent release of information. The fact that such a high search fee is being levied relating to information apparently referred to in your testimony--and therefore not likely to be inaccessible within the agency--raises questions concerning the CIA's compliance with this congressional intent. I personally believe that the information requested by Mr. Halperin should be released by the CIA on its own initiative; surely in this light Mr. Halperin's request for a waiver of fees should be granted.

Sincerely,

Edward M Kennedy

Edward M. Kennedy

MORTON H. HALPERIN
1122 MARYLAND AVENUE, N. E.
WASHINGTON, D. C. 20002
(202) 544-5380

05-75-1903
OLC 75-2011

May 13, 1975

Halperin letter

Mr. Robert S. Young
Freedom of Information Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Young:

I write to elaborate on my request for a waiver of fees in connection with my February 19th request for Attachment A documents (44 itemized descriptions of documents).

In your letter to me of April 28th and May 8th, you state that you have carefully considered my request in light of the AG's Memorandum and the terms of the statute and your regulations and have concluded that a waiver of fees is not warranted. Since you did not solicit from me any additional information about the purpose of my request, I am at a loss to understand how you could have reached even a tentative judgment about whether the release of the requested information "can be considered as primarily benefiting the general public."

Your letters state that "as a matter of basic policy" you are "unable to conclude that waiver or reduction of fees is warranted." I would appreciate your advising me as to the content of this "basic policy." I assume it is not a policy of seeking to discourage use of the FOIA by interested public interest groups. As I am sure you are aware, the Conference Report states explicitly "that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." I am confident that your "basic policy" is consistent with the Conference Report and would be grateful if you could specify just what it is.

In my discussions with Messrs. Warner and Lansdale leading up to my agreement in writing with Mr. Lansdale of 7 April 1975, I made it clear that all of the 44 items were sets of files referred to by Mr. William Colby in his statement of 15 January 1975. Indeed, I provided Mr. Warner with a marked copy specifying where each item was discussed. I also indicated in those discussions that I was prepared to narrow my requests in order to avoid the necessity of major searches. I did, in fact, narrow many of the items as I discussed them with Messrs. Warner and Lansdale on 6 March 1975. For example, I indicated that items 32 and 33 relating to the response to the Director's Memorandum of May 9, 1973 should be limited to those files maintained as a unit in the office which conducted the review. I have since indicated my willingness to have further discussions designed to narrow the request.

The documents requested all relate to domestic activities of the Central Intelligence Agency which the Director described publicly in at least general terms. I find it difficult to believe that these files were not located and examined in the preparation of (1) Mr. Colby's Report to the President, (2) Mr. Colby's public statement and testimony before various congressional committees, (3) CIA testimony and provision of documentation to the Rockefeller Commission, and (4) requests of the Senate Select Committee. I find it difficult to believe that in light of the intense presidential, congressional, and public interest in the CIA's domestic activities that the CIA awaited my request before searching for the very files identified by the Director as constituting the files of the domestic activities of the CIA. Obviously, if these files were located for some other purpose the agency cannot charge search fees for responding to my request.

It is difficult for me to conceive of a set of documents whose release would more clearly benefit the general public. There is, as you are well aware, great public interest in the domestic activities of the CIA. Anything on that subject which can properly be made public would, in my view, clearly benefit the general public.

It is clear that, as the Attorney General's Memo (AG's 1974 FOI Amdts Mem) indicates, the waiver is discretionary. (p. 16.) However, as the AG Memo notes:

> Where an agency perceives a substantial question whether release of requested information can be considered as "primarily benefiting the general public," it should consider exercising its discretion under this provision. What is required is the application of good faith in determining whether public payment should be made for essentially public benefits. In its consideration of the matter, the agency need not employ any particular formalized procedure, and may draw upon both special expertise and general knowledge concerning such matters as the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, the likelihood that tangible public good will be realized, and other factors which may be pertinent to the appropriateness of public payment. Deliberate, irrational discrimination between one case and the next is of course improper; but neither is it necessary to develop a system of rigid guidelines or inflexible case precedents. (p. 15).

The Conference Report says this about fees:

> . . . In addition, the conference substitute retains the agency's discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged.
>
> By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.
>
> (Conference Report, No. 93-1380, p.8)

The Senate Bill approved unanimously by the Judicary Committee contained the language finally approved. The Senate Committee Report (93-854) states that "(t)his public-interest standard should be liberally construed by the agencies. . . ." (p. 12).

Also of relevance in the legislative history, I believe, is the discussion of attorneys fees and court costs -- which have an analogous purpose -- that the law should work so "that the average citizen can take advantage of the law to the same extent as the great corporations."

The Senate Report relating to attorney's fees reads as follows:

> It should be noted that the criteria set out in this subsection are intended to provide guidance and direction -- not airtight standards -- for courts to use in determining awards of fees. Each criterion should be considered independently, so that, for example, newsmen would ordinarily recover fees even where the government's defense had a reasonable basis in law, while corporate interests might recover where the withholding was without such basis.
>
> (Senate Report N. 93-854, pp. 19-20.)

Returning from this consideration of the analogous issue of attorney's fees to the direct question, Congress clearly intended that the assessment of fees not be a bar to the use of the FOIA by private individuals or public interest groups. At the same time, it permitted the charging of fees so that corporations or individuals using the Act for private gains could be charged the cost of the services provided.

The legislative history of the provision calling for a liberal interpretation of the phrase "primarily benefiting the public" suggests that all fees should be waived whenever the release of the information contributes to public debate on an important policy issue and when the person

requesting the information is doing so for the purpose of contributing to the "uninhibited, robust and wide-open" debate on public issues which the Supreme Court has repeatedly held to be protected by the First Amendment (see, e.g., New York Times v. Sullivan.)

This approach suggests that all fees should be waived if two criteria are met: (1) the information released will contribute importantly to public debate on important policy issues and (2) the information was requested to be used for that purpose.

This request for information was made by me on behalf of the Project on National Security and Civil Liberties. The Project is jointly sponsored by two public interest organizations, the American Civil Liberties Union and the Center for National Security Studies of the Fund for Peace. The Project makes requests under the Act for information which it believes would make an important contribution to public debate on major policy issues. When it receives information under the Act the material is immediately made available to the press and the public and to other public interest organizations with a substantive interest in the public issues affected by the material. Availability is made known by contacts by phone or letter to individuals and organizations known to be interested in the data and by informing members of the press who express interest. In the future, we plan to publish a newsletter which will, inter alia, report on what information is released. Copies are available for inspection at the Project office. Neither the Project nor I personally will benefit financially from release of this information. No attempt will be made, for example, to hold the information for an "exclusive" article.

The Project, then, is acting to fulfill the intent of Congress that more information be made available, in particular on problems of foreign policy and national defense. By identifying documents which, if subject to a new declassification review, could be released in whole or in part, the Project aims at contributing to the purposes of the Executive Order on Classification as well as the Freedom of Information Act.

The requested documents which are the subject of this letter fit the two criteria set forth above, and hence, I believe, should be provided with all fees waived.

I enclose copies of an exchange of correspondence with the Department of Defense concerning a waiver of fees. As you will see, based on a similar representation that Department agreed to waive fees,

In summary, Congress entrusted waiving of fees to the discretion of the agencies; it did so intending that the agencies interpret the provision liberally and consistently with Congress' intent that the Act contribute to public debate on major issues. The documents requested will in fact make an important contribution to that debate and were requested for that reason and will be used in pursuit of that objective.

Sincerely yours,

Morton H. Halperin

mhh/cmm
cc: Sen. Edward Kennedy, Chairperson
Subcommittee on Administrative Practices
Rep. Bella Abzug, Chairperson
Subcommittee on Government Information and
Individual Rights